

***United States Court of Appeals
for the Second Circuit***



APPENDIX

ORIGINAL

77-1402

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

-against-

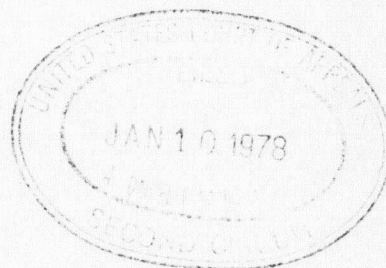
ROSE SMITH,

Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

Appellant's Appendix

MICHAEL S. WASHOR,
Assigned Counsel
299 Broadway
New York, N.Y. 10007
(212) 732-2077



PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES (Pages 1a-2a)

DOCKET - U.S. District Court		indicted as, SMITH, ROSE		Case Filed Mo. Day		77 0340 04	
0208 1 0865		DOE, JANE		05 05			
District Office		a/k/a "Rose"		No. of Defs		05	
		TN ROSE NEWKIRK		JUVENILE			
(LAST, FIRST, MIDDLE)							

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
21:846	Consp. to violate Federal Narcotics Laws	1
21:812, 841(a)(1) & 841(b)(1)(B)	Distr. & possess. of Heroin, I.	2

9/6

BAIL - RELEASE	
☐ AMT ☐ Denied ☐ Set \$ 5,000 Date 5-3-77 ☐ Bail Not Made ☐ Status Changed (See Docket)	☒ Fugitive ☐ Pers. Resp. ☐ PSA conditions ☒ 10% Deposit ☐ Surety Bond ☐ Collateral ☒ 3rd ☐ Pny Cust ☐ Other

II. KEY DATES & INTERVALS			
ARREST or U.S. Custody Began * 5-3-77 Summons Served First Appearance 5-3-77	INDICTMENT Information ☐ High Risk Date 5-5-77 Indict Waived ☐ In Charging District	ARRAIGNMENT 5-12-77 1st Plea 5-12-77 Final Plea	TRIAL Trial Set For 6-27-77 Voir Dire ☐ Trial Began 7-5-77 Trial Ended 7-18-77

MAGISTRATE			
SEARCHED ☐ SERIALIZED ☐ INDEXED ☐ FILED ☐ 4/26/77 S.S.-08AE 4/26/77 S.S.-08AE	INITIAL APPEARANCE DATE 5-3-77 PRELIMINARY EXAMINATION OR REMOVAL HEARING Date Scheduled 5-23-77 Date Held X NOT WAIVED PREVENING INDICTMENT	INITIAL NO. KS 08AK OUTCOME ☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW	21 USC 812,841(a)(1) and 841(b)(1)(B) - NARCOTICS

U.S. Attorney for East

Alan Levine
791-0932

ATTORNEYS

DOCKET ENTRIES	
BROOKLYN Knuckles-01, Doe-02, Brown-03, Simpson-05 4/26/77 Complaint filed, warrant issued 5-3-77 Defendant presented, Legal Aid (Curley) assigned, deft. released on a \$5,000 PRB secured by \$500 Cash to be deposited by 5-4-77. Legal assigned for bail only, will retain private counsel 5/4/77 Defendant released on bail, address: 196 Bradhurst Ave., N.Y. 5-5-77 INDICTMENT FILED, 77 CR 340.....Knapp, J. Ordered sealed. 5-6-77 Indictment Ordered unsealed.....Knapp, J. 5-12-77 Deft. (atty. John P. Curley for arraignment purposes only) pleads not guilty. Deft. continued free on bail fixed at \$5,000 PRB secured by \$500 cash. Case assigned to Haight, J. for all purposes.....Knapp, J. 5-17-77 Filed Order that Michael S. Washor, Esq. 16 Court Street Bklyn, NY 11241 is hereby added to the Panel of Attys. for the sole purpose of representing dft. Rose Smith, etc. & that this order be filed with the clerk of the USCA.....Edelstein Ch. J. (mailed notice & sent copy to Millie Russo)	EXCLUDABLE DEFENSE (b) (1) (c) (d)

IV PROCEEDINGS (continued)

PAGE TWO

(DOCUMENT NO.)

R.T.C. Dft. Rose Smith by Michael Washor, Govt by Alan Levine,
AUSA, Trial Set for June 27, 77 @ 10AM. All Motions by June
6, 77.....Haight J.

17 Filed transcript of record of proceedings, dated 5-17-77

5-77 Trial begun

6-77 Trial cont'd

7-77 Trial cont'd

7-8-77 Trial cont'd

7-11-77 Trial cont'd

7-12-77 Trial cont'd, all parties rest.

7-13-77 Trial cont'd, summations, Judge's charge to Jury

7-15-77 Trial cont'd, Jurors continue deliberations

7-18-77 Trial continues, Jurors continue deliberations. Jury verdict
at 3:00 p.m. Dft. guilty on ct. 1 on ct. 2, not guilty.
Bail cont'd. Pre-Sentence report ordered. Sentence 8-31-77

.....Haight, J.

7-25-77 Filed Opinion #46206, on Court's ruling with respect to
possible variance between the charge in the indictment and
the proof adduced at trial.....Haight, J. m/n

8-31-77 Filed Judgment & Commitment (ATTY. MICHAEL S. WASHOR PRESENT)
The Dft. is hereby committed to the custody of the Atty. Gen.
or his authorized representative for imprisonment for a
period of FIVE (5) YEARS, on Count 1. Pur. to the provisions
of Title 21, Sec. 841(b) U.S. Code, the dft. is placed on
SPECIAL PAROLE for a term of SIX (6) YEARS to commence upon
expiration of confinement. Dft. is cont'd on present bail
until Sept. 6, 1977 at 10:00 a.m. at which time she is to
surrender to the U.S. Marshal for service of sentence.
.....Haight J.

Issued Commitment 8-31-77.
9-6-77 Filed Notice of Appeal.

A TRUE COPY
RAYMOND M. BURGHARDT, Clerk

By

Deputy Clerk

INDICTMENT (Pages 3a-5a)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

77 CRIM. 0340

UNITED STATES OF AMERICA,

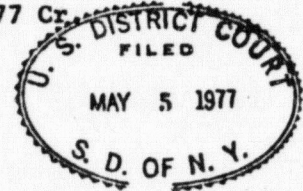
-v-

MARION KNUCKLES, a/k/a "Glenn",
JANE DOE, a/k/a "Gwen", RAYMOND BROWN,
ROSE SMITH, and YOLANDA VALDEZ SIMPSON,
a/k/a "Yogi",

Defendants.

INDICTMENT

77 Cr.



The Grand Jury charges:

1. From on or about the 1st day of August, 1976, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, MARION KNUCKLES, a/k/a "Glenn," JANE DOE, a/k/a "Gwen", RAYMOND BROWN, ROSE SMITH and YOLANDA VALDEZ SIMPSON, a/k/a "Yogi," the defendants, and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about August 16, 1976, MARION KNUCKLES, a/k/a "Glenn", the defendant, had a telephone conversation concerning the conditions in the street for selling heroin.

2. In or about October, 1976, MARION KNUCKLES, a/k/a "Glenn", JANE DOE, a/k/a "Gwen", and RAYMOND BROWN, the defendants, delivered a quantity of quinine and bonita to the defendant YOLANDA VALDEZ SIMPSON in the vicinity of 1160 Fifth Avenue, New York, New York.

3. In or about October, 1976, MARION KNUCKLES, a/k/a "Glenn", and JANE DOE, a/k/a "Gwen", the defendants, delivered a quantity of heroin to YOLANDA VALDEZ SIMPSON, the defendant, in the vicinity of 1160 Fifth Avenue, New York, New York.

4. In or about October, 1976, MARION KNUCKLES, a/k/a "Glenn", RAYMOND BROWN, ROSE SMITH, and YOLANDA VALDEZ SIMPSON, the defendants, diluted heroin with quinine and bonita and placed the diluted heroin in approximately 2000 quarter bags of heroin hydrochloride in the vicinity of 626 Riverside Drive, New York, New York.

5. In or about October, 1976, MARION KNUCKLES, a/k/a "Glenn", the defendant, gave YOLANDA VALDEZ SIMPSON, the defendant, approximately \$400.00.

6. On or about October 12, 1976, YOLANDA VALDEZ SIMPSON, the defendant, had a telephone conversation concerning an argument with the defendant MARION KNUCKLES, a/k/a "Glenn" about the payment to her of additional money for preparation of the heroin for distribution described in Overt Act Number 4.

COUNT TWO

The Grand Jury further charges:

On or about the 1st day of October, 1976, in the Southern District of New York, MARION KNUCKLES,

CU:KCU

a/k/a "Glenn", JANE DOE, a/k/a "Gwen", RAYMOND BROWN, ROSE SMITH, and YOLANDA VALDEZ SIMPSON, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit, approximately 2,000 quarter bags of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B).).

Annex L. Jarvis
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, JR.
United States Attorney

TB

THE COURT: The second commandant is like unto that and related to it. You must keep an open mind and not resolve any issue until you have heard all the evidence in the case and have commenced your deliberations. The reasons for these rules, the common sense reasons, commend themselves to you. How often it is in life that we think we know the story and know what the reason is only having heard part of it, and it is not until we have heard the entire story that we realize and recognize sometimes that our first impressions were not accurate. That is true in life, and it is true in this trial, which is a function of life. Consently, I charge and instruct you to keep an open mind until all the evidence is in and do not discuss the case among yourselves or with anyone else until all the evidence is in.

Those are my preliminary instructions. I am sure you will abide by them.

We come now to the opening statements. The government under our procedures goes first. Mr. Levine, do you wish to address the jury on behalf of the United States?

MR. LEVINE: Yes, your Honor.

May it please the Court, ladies and gentlemen of the jury:

One evening last Fall in an apartment on Riverside Drive and 139th Street right here in Manhattan, four people worked till the early morning hours cutting and mixing heroin. They worked on a big glass table with strainers and spoons and turned a package of heroin about this big into 2000 glassine envelopes for sale to the junkies on the street. This man, the defendant Marion Knuckles was in charge. It was his operation. That man, the defendant Raymond Brown, was his righthandman, and that woman Rose Smith, worked all night with these two men and with another preparing that heroin for sale. This case will tell you the story of how these three defendants and others working with them turned heroin into thousands of packages for distribution to people on the street.

My name is Alan Levine and I am an Assistant United States Attorney, and it is my privilege and responsibility to present this case to you on behalf of the government. My purpose in talking to you now, is to give you an idea about what this case is all about. So that when you see the evidence and hear the testimony, you will know where it is all leading. As the Judge has told you, this is a criminal case, and the defendants are charged here with violating the Federal narcotics laws.

7A

1 hbp3
2 The defendants are Marion Knuckles, who will also be
3 referred to as "Glenn," which is a nickname; Raymond
4 Brown in the tan shirt, and RoseSmith in the red shirt.
5 As the Judge has told you, the indictment here is in two
6 counts. It charges very simply two separate violations
7 of the law. Count 1 is the conspiracy count, and it
8 charges that these three defendants and others working
9 with them with conspiring together to violate the Federal
10 narcotics laws. That is, they conspired to possess
11 with intent to distribute heroin. That is Count 1.
12 Count 2 is known as the substantive count, and it charges
13 these three defendants and others with possessing with
14 intent to distribute approximately 2000 glassine envelopes
15 of heroin. That is what the government's proof will
16 show you beyond a reasonable doubt.

17 Now I want to take moment briefly to tell
18 you what it is the government will show you. The proof
19 will show that these three defendants conspired together
20 and with others to distribute and possess with intent to
21 distribute heroin in street size glassine envelopes.
22 Those glassine envelopes, ladies and gentlemen, are
23 called quarters or quarter bags. The proof will show you
24 how a large quantity of heroin and mixers are sifted and
25 strained together during all-night session and made into

1 thousands of those quarter bags for sale on the street.

2
3 This case then, ladies and gentlemen, is a
4 capsule view. This case is about the defendant Marion
5 Knuckles' operation. You will hear that in late
6 September, 1976, he approached a co-conspirator,
7 Yolanda Valdez Simpson, and asked if she knew of an
8 apartment in which they could work all night. Yolanda
9 Valdez Simpson made arrangements for him to use her
10 apartment at 66 Riverside Drive right here in Manhattan.

11 A couple of nights later, Yolanda Valdez
12 Simpson met Knuckles, Raymond Brown and a Gwen Owen,
13 another co-conspirator, at the side entrance of Gwen
14 Owen's apartment on Fifth Avenue and 97th Street. There
15 they loaded Yolanda's car with boxes of mixtures, quinine
16 and bonita and with narcotics paraphernalia. Yolanda
17 and Raymond Brown took those boxes to Yolanda's apartment
18 just as Knuckles told her to.

19 A couple of nights later, Yolanda and Knuckles
20 met again and Knuckles again took Yolanda with him to
21 Gwen Owen's apartment. There, after meeting with
22 Gwen, Knuckles handed Yolanda a pink shopping bag.
23 That bag contained the heroin.

24 Once again, just as Knuckles told her to,
25 Yolanda took the bag to her apartment.

So, ladies and gentlemen, the proof will

show the travelling heroin factory was all in place.

That night, Knuckles went to Yolanda's apartment, later joined by Raymond Brown and Rose Smith. All night the evidence will show they worked at the dining room table with the heroin. Knuckles, Raymond Brown, Rose Smith and Yolanda. Straining, mixing, spooning, taping, counting out approximately 2000 glassine envelopes of heroin.

Early the next morning, you will hear Knuckles, Raymond Brown and Rose Smith left with the quarter bags for sale to the addicts on the street. The proof will then show you that after Yolanda complained to Knuckles that he didn't pay her enough for what she had done, he beat her up on the street. That basically is the government's proof on the charge in the indictment of distributing and possessing with intent to distribute heroin.

Ladies and gentlemen, you will hear that this conspiracy was not created overnight. The evidence will show that these defendants have known each other at least for a couple of years, that they all hung up around 116th Street and Eighth Avenue in Manhattan, primarily in two different bars, the Roma Gardens and the Satin Doll.

So that is what the government will prove to you here.

But how will the government present this case to you? You will hear about it in three separate ways. No. 1, ladies and gentlemen, you will hear Yolanda Valdez Simpson testify about her relationship with these three defendants in this case. You will hear Yolanda admit her involvement in this conspiracy to sell heroin, and in other similar operations with Knuckles and others before she was arrested. Yolanda will tell you the details about the conspiracy from the inside. She will tell you she met all of them at various times in the last three years and how she was one of Knuckles' workers off and on over the last two years.

Before I go further, I want to tell you that the testimony of Yolanda Valdez Simpson is called accomplice testimony, since she was an active participant with the defendants in the crimes that are charged here. The Judge will tell you during the trial that you should review accomplice testimony carefully. The government invites you to do this. The government just asks that you listen and evaluate that testimony about the inner workings of the narcotics conspiracy.

3A 1 jpp
2 Yolanda is uniquely qualified because she
3 was there with these defendants, running the errands,
4 working all night side by side with them, preparing the
5 heroin in quarter bags for sale. So that is the first way
6 that the government will prove its case to you. But I
7 told you there were three.

8 No. 2, you will hear from other people in the
9 narcotics world of these defendants, accomplices on other
10 deals and other persons who know something about this case.
11 These people, ladies and gentlemen, will corroborate Yolanda's
12 testimony. As with her, the government invites you to
13 listen carefully to their testimony.

14 That, ladies and gentlemen, is the second way
15 the government will prove its case to you.

16 Finally, No. 3, you will see and hear physical
17 evidence, statements made by some of these defendants at
18 the time of their arrest, recorded conversations about these
19 very same events as physical evidence. All this evidence,
20 ladies and gentlemen, will support the testimony that you
21 will hear. That is how the government will prove this
22 case to you.

23 This is a very serious and important matter.
24 It is important to the defendants on trial here before you.
25 It is also equally important to the government whose

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jpp

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interest in the protection of the public against the commissions of the crimes that are charged here is compelling. It is only in courtrooms like this --

MR. WASHOR: Objection, your Honor.

MR. LEVINE: -- where that interest is protected.

THE COURT: At this stage of the game, I think we should just confine ourselves to the facts, Mr. Levine.

MR. LEVINE: I am sure you will pay attention to the evidence, all the evidence. And that you won't pass any judgment or form any conclusions until all of the evidence is in. That is all anyone can ask of you, that you fairly judge these defendants on the basis of all of the evidence.

The government submits that if you carefully consider all of the evidence that will be before you and if you abide by your oath to judge the defendants on the basis of all of that evidence and judge it in the light of the law as his Honor will instruct you, that you will find these defendants guilty as charged.

Thank you very much.

THE COURT: Mr. Rosenberg, do you wish to address the jury on behalf of the defendant Knuckles?

MR. ROSENBERG: The defendant Knuckles will

1

2

A Yes.

3

Q And you pointed the gun at him?

4

A Yes.

5

Q You testified that you were very close with Warren Simms, am I correct?

7

A Yes.

8

Q The first instant you looked at him as a father image, am I correct, isn't that what you said?

10

A Yes.

11

Q You also admitted that you had sexual relations with him, am I correct?

13

A Yes.

14

Q You also admitted that he was involved in a narcotics business, correct?

16

A I don't know if he was involved but I did participate with him.

18

Q Didn't you help him in a narcotics business?

19

A I helped him, yes.

20

Q Well, if you helped him, he was in the business, was he not?

22

A I don't know if he was in the business.

23

Q Was he involved with distributing narcotics?

24

A I don't know.

25

Q What kind of narcotics did you help him with?

- 1 hblt 11
- 2 A Heroin.
- 3 Q All heroin?
- 4 A I assume.
- 5 Q Didn't you know?
- 6 A It could have been heroin, bonita, quinine,
- 7 powder.
- 8 Q You just don't know, do you?
- 9 A Right.
- 10 Q But didn't he teach you his method as you explained
- 11 earlier?
- 12 A He told me what each piece was.
- 13 Q Showed you how to package it?
- 14 A Yes.
- 15 Q Showed you how to wrap it?
- 16 A Yes.
- 17 Q In other words, Mr. Glenn wasn't your teacher.
- 18 your father image was your teacher, am I correct, Mr. Simms?
- 19 Am I right?
- 20 A In a way.
- 21 Q He broke you in, didn't he?
- 22 A A little bit.
- 23 Q You weren't asked to testify against him, were
- 24 you? Were you?
- 25 A I was told to say what I knew about him.

1 hblt 19

Simpson-cross

2 Q Now, you testified that that strainer in your
3 apartment was used for cooking, am I correct?

4 A It might have been.

5 Q Would you explain to this jury what it is that
6 you prepare or cook with that has cocaine in it?

7 A I said this strainer is used for cooking. I didn't
8 say I cooked with it.

9 Q Will you please explain how a strainer in your
10 apartment has cocaine traces on it if you and your husband
11 never use cocaine?

12 A When the people came to use my apartment to cut
13 heroin, they brought cocaine and they might have used that
14 to sift it --

15 Q Are you saying, under oath --

16 THE COURT: Let her finish.

17 MR. WASHOR: I'm sorry.

18 A I said they might have used that strainer to
19 strain their cocaine.

20 Q Are you saying under oath that this woman who
21 was alleged to be in your apartment may have just packaged
22 cocaine, is that your testimony?

23 A I didn't say packaged, I said she might have used
24 it.

25 Q Used it?

1 hblt 20

Simpson-Cross

2 A Right.

3 Q Did you see them smell it, snort it?

4 A Yes.

5 Q Did you smell it or snort it?

6 A No.

7 Q While they were packaging heroin?

8 A Right.

9 Q They were snorting cocaine, is that your
10 testimony?

11 A Yes.

12 Q What does cocaine look like?

13 A White.

14 Q What does heroin look like?

15 A Off-white.

16 Q You can tell the difference, am I correct?

17 A I can see.

18 Q Did you taste it?

19 A No.

20 Q Do you know what it tastes like?

21 A No.

22 Q Do you know what the taste test is?

23 A What?

24 Q Do you?

25 A No.

17A

1 hblt 21

Simpson-cross

2 Q Do you know the difference between cocaine and
3 heroin?

4 A Like I said, the cocaine looked whiter than the
5 heroin.

6 Q You will produce, Mr. Levine, I suppose, the
7 equivalent of Exhibit 12.

8 MR. LEVINE: Yes, your Honor.

9 MR. WASHOR: It is upstairs. I don't need it right
10 at this moment.

11 MR. LEVINE: The government would stipulate that
12 there is another piece of narcotics paraphernalia.

13 MR. WASHOR: Before you describe it, if you are
14 going to produce it, before I ask for the stipulation, may I
15 continue questioning the witness?

16 THE COURT: What is presently before us?

17 MR. WASHOR: Right now, absolutely nothing.

18 THE COURT: All right, then let's go on.

19 MR. WASHOR: I withdraw the question.

20 THE COURT: Whatever it was, it is withdrawn.

21 This item is in evidence. It should be marked
22 in evidence. Do you wish it marked as --

23 MR. WASHOR: Deemed marked at this point.

24 THE COURT: Or deemed admitted. It is admitted
25 and deemed marked.

18.

1 hblt 22

Simpson-cross

2 Do you object to having this exhibit marked as
3 Smith's Exhibit A?

4 MR. WASHOR: No.

5 THE COURT: Then let it be marked Exhibit A in
6 evidence.

7 (Defendant Smith's Exhibit A was received
8 in evidence.)

9 MR. WASHOR: May I continue?

10 THE COURT: Yes, please.

11 Q You described the nature of this operation in
12 October of 1976 where individuals were sitting around a table
13 using spoons, am I correct?

14 A Yes.

15 Q And a measure?

16 A Yes.

17 Q Were there any spoons used to measure the cocaine?
18 Yes or no.

19 A No. I'm not sure.

20 Q Don't you remember?

21 A Did they use spoons to measure cocaine?

22 Q To measure the cocaine.

23 A I'm not sure.

24 Q There was just a little cocaine there that they
25 used to snort, isn't that what you're testifying to?

19.

nb1t 23

Simpson-cross

1 A I don't think it was a little.

2 Q They brought a package in with them; is that your
3 testimony?
4

5 A Aluminum foil.

6 Q Did they bring the package in with them?

7 A Yes.

8 Q How big a package of aluminum foil?

9 A About that much (indicating).

10 Q Enough to snort, am I correct?

11 A Yes.

12 Q You have described a spoon as a measuring device,
13 am I correct?

14 A Right.

15 Q And it was used to cut white powder, am I
16 correct?

17 A To measure the heroin, right.

18 MR. ROSENBERG: Objected to, your Honor.

19 Q To measure the white powder?

20 A Yes.

21 MR. ROSENBERG: I object to the classification of
22 the use of the word "heroin" and move that it be stricken.

23 THE COURT: I will ask the jury to disregard that
24 particular word and substitute for it "white powder." Spoons
25 were used to measure white powder.

20.

hblt 24

Simpson-cross

MR. ROSENBERG: Thank you.

THE COURT: During the incident in question.

Q These spoons, were they used for anything else, such as cooking, either in your apartment --

A I'm not sure.

MR. WASHOR: We will stipulate Exhibit 12 and the document will be produced at a future date?

MR. LEVINE: Your Honor, the government will stipulate that there is another spoon which was retrieved from that -- taken from that apartment, which also had cocaine traces on it.

THE COURT: When you say another spoon, Mr. Levine, do you mean a spoon, the object before us now is not a spoon?

MR. LEVINE: That's correct. That is a sifter.

MR. WASHOR: I presume the object will be brought down tomorrow?

MR. LEVINE: Yes. And the government will stipulate that that contained traces of cocaine.

THE COURT: This is a spoon which comes from the apartment, is that so?

MR. LEVINE: It is a spoon, your Honor.

Q This spoon comes from your apartment, the way the strainers do, am I correct?

A They got it from my apartment.

21

1 hblt 3

2 entire statement be omitted.

3 THE COURT: You will not see it in the charge.

4 MR. WASHOR: I will not hear it, you mean.

5 THE COURT: You will not hear it. Or see it in
6 the subsequent record.

7 Government's request number 14 is granted as
8 charged.

9 15 is granted as charged.

10 16 is granted as charged.

11 17 is granted as charged.

12 18 is granted as charged.

13 19 --

14 MR. WASHOR: Yes, on number 18, you say granted
15 as charged?

16 THE COURT: Yes.

17 MR. WASHOR: Are you going to use the language?

18 THE COURT: If you have any particular language
19 that concerns you, let me know about it.

20 MR. WASHOR: Are you going to substitute cocaine
21 for heroin?

22 You see, the irony of my comment is that we are
23 using conclusions.

24 THE COURT: To answer your question, I am going to
25 substitute cocaine for heroin or vice-versa.

22.

1 hblt 4

2 19 is granted as charged.

3 MR. WASHOR: Your Honor, insofar as 19 is
4 concerned, I would request the fourth line from the top of
5 page 2, where the sentence begins, "For inferring that the
6 material in question is narcotics," I think you ought to
7 substitute the word heroin, because then we are talking about
8 any kind of narcotic.

9 THE COURT: That has been attended to.

10 MR. WASHOR: Then I would request also, your
11 Honor, that there be an addendum. I would suggest the following
12 addendum:

13 The jury must also consider the colloquial language
14 used by the participants as evidenced by the tapes, such as
15 "smoke," "silver quarters," to determine the nature of the
16 substance in question.

17 This jury must also consider the laboratory
18 analysis of the implements in question and the uncontroverted
19 fact that traces of cocaine were found upon the mixing
20 implements.

21 The Court has a right, you do in fact comment on
22 the facts of the case preceding the request of the government.
23 They talk about the testing of samples, of powder, deviousness,
24 secrecy of transactions, code words. I think the Court has a
25 right to protect the accused from the standpoint of the

23A

1 hblt 5
2 evidence.

3 What I have suggested is not subject to interpre-
4 tation. They are facts within the purview of the case. To
5 permit one side and not the other side seems somewhat unfair.

6 THE COURT: The government suggests certain
7 circumstances pointing in a particular direction as far as
8 the nature of this substance is concerned, Mr. Levine.

9 MR. LEVINE: Your Honor, I think that there is a
10 substantial question of law here, whether what seems to be
11 a defense of these defendants, namely that what was involved
12 here was cocaine and not heroin constitutes a legal defense.
13 The government intends to research that question, that legal
14 question, tonight, and will brief it for the Court for tomorrow
15 morning.

16 It is the government's position that even if
17 counsel are correct that the substances were cocaine, that at
18 most, it would be a variance between the indictment and proof,
19 and it would be a legal question for this Court to determine
20 whether or not it was a material variance that prejudiced the
21 defendants, and that is a legal question, your Honor.

22 I have a feeling that the question of whether or
23 not one can be convicted under 841 of possessing with intent
24 to distribute narcotics, drug controlled substances, when
25 the proof at trial is cocaine and the charge was heroin is not

1 hblt 6
2 a material variance.

3 If that is the law, your Honor, which the govern-
4 ment will determine, will try to find for the Court tonight,
5 then the charge that Mr. Washor is expecting and the defense
6 that is going to be offered in the summation should not be
7 charged to the jury as a legal defense.

8 MR. WASHOR: I am going to request that we do not
9 proceed with summation at this point. I think that would be
10 very unfair. To proceed to summation this afternoon, then
11 have the Court take a position contrary to our discussions
12 now after final argument has been presented, your Honor, and
13 changing the entire theory --

14 MR. ROSENBERG: Your Honor, I think the difference
15 between cocaine and heroin, the preparation, the look of it,
16 how it is packaged, how it is handled, how it is treated, the
17 mixing ingredients and all, are so contrary and repugnant, one
18 to the other, that the government could seriously take this
19 position.

20 If the government took a position of cocaine,
21 maybe experts could have been brought in. It is completely
22 misleading and certainly surprising for the government at this
23 point to say, well, it could have been cocaine and not heroin,
24 when certainly throughout everything, every report, every
25 test that was made was made for heroin.

25;

1 hblt 7

2 MR. LEVINE: Of course the government claims that
3 it was heroin, your Honor.

4 What is suggested here is an argument on the facts
5 that are going to be made by defense counsel and it is no
6 surprise to them, should not be any surprise. They haven't
7 asked for an advance ruling by the Court. There is no charge
8 that has been submitted by any of the defense counsel that if
9 they find that cocaine was involved, then they should acquit.

10 There has been no charge, your Honor. The
11 government is merely submitting to the Court that in the event
12 the argument is made that there is a question whether the
13 Court ought to charge that there is a legal defense, the
14 government is not going to request that they charge that it is
15 not a defense, but there is a question as to whether the Court
16 ought to charge in this request number 19 the facts that Mr.
17 Washor is suggesting. That's all.

18 THE COURT: But if there is a question, Mr. Levine,
19 about that, and if the government wants to make a further
20 submission to me about that, isn't it right that perhaps that
21 question should be determined by the Court, the legal suffi-
22 ciency of the defense, even if established on the facts, before
23 counsel make their arguments?

24 MR. LEVINE: They can still make them, your Honor.

25 MR. WASHOR: Judge, I don't want to advance an

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2 argument where I am going to be put in a position that the
3 Court will be telling the jury that it was a very nice try
4 by Mr. Washor, but he is dead wrong.

5 I don't want you to charge me out of a summation.

6 I am in a position, I think, that is the reason
7 for the rules of going through the requests to charge and having
8 a decision by the Court prior to final argument. So that
9 an advocate doesn't find himself in a position where he is now
10 disagreeing with the Court.

11 THE COURT: It really seems to me there is some
12 force to that. It has been apparent throughout the course of
13 the trial that the defendants have been putting themselves
14 into a position of being able to argue to the jury that the
15 government loses because the evidence, to the extent that it
16 show anything, indicates cocaine and not heroin.

17 Having paved the foundation for that argument, if
18 defense counsel then makes the argument with all the passion
19 and eloquence at their command and then the very last thing
20 before the deliberations start the Judge sits up there and
21 says, "Hey, it doesn't make any difference, you know, as a
22 matter of law, whether it was cocaine or heroin that is not
23 a particularly happy position for the defendants to find them-
24 selves in.

25 At the very least it seems to me, if the defendants

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1 hblt 9

2 had known in advance that that was going to be the Court's
3 ruling on the law, the might very well have fashioned their
4 closing arguments somewhat differently.

5 MR. WASHOR: And cross examination.

6 THE COURT: Well, that is over the dam.

7 MR. WASHOR: But that is precisely the point.

8 You see, Judge, you are considering making and
9 giving and you said you are going to give a multiple conspiracy
10 charge. What you are telling the jury in a multiple conspiracy
11 charge without delineating with any type of specificity to the
12 words of cocaine or heroin, you are telling this jury, "Now,
13 look, this defendant or these defendants are charged with the
14 following crimes."

15 The government may well have proved that they
16 committed 10,000 other crimes during the very same time period,
17 but you the jury must only make a determination as to whether
18 they are guilty of the crimes charged.

19 So, you are telling them about the legal defenses
20 that are available. I intend to argue that if there was a
21 conspiracy involving cocaine, the Court will tell you that
22 that is not what defendant Smith is charged with. She is
23 charged with the conspiracy to violate the narcotics law, and
24 look at the indictment, specifically, to wit, violate the
25 statute involving heroin hydrochloride.

28;

1 hblt 10

2 MR. LEVINE: Your Honor, if the Court is going to
3 rule like that, perhaps we ought to go downstairs and the
4 government could start to do its legal research and submit
5 something to the Court.

6 MR. ROSENBERG: Your Honor, Mr. Levine is asking
7 your Honor to say, to change either/or heroin or cocaine.

8 MR. LEVINE: Oh, no, your Honor.

9 MR. ROSENBERG: Is he substituting cocaine now
10 for heroin?

11 MR. LEVINE: Absolutely not.

12 MR. ROSENBERG: Well, what is it? It has to be
13 one or the other. He is asking your Honor to say that the
14 grand jury considered cocaine, because we are including now
15 cocaine in the indictment.

16 With all due respect, and an apology to the Court,
17 is the Court putting something into the indictment that was
18 never ever before the grand jury?

19 The only thing that I saw before the grand jury in
20 all the minutes I have seen, was heroin, a conspiracy for
21 heroin. Now the government is asking the Court to change the
22 indictment, something that was never considered by the grand
23 jury, to include cocaine.

24 THE COURT: The indictment, Count 1, we will come
25 to Count 2 in a moment, as to whether or not Count 2 could

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1 hblt 11

2 survive such a variance, but the conspiracy count talks about
3 conspiracy to distribute and possess with intent to distribute
4 Schedule I and II narcotic drug controlled substances.

5 MR. WASHOR: Then they define the substances.

6 THE COURT: One of the overt acts refers to
7 heroin.

8 MR. WASHOR: This may give rise to a Costello-
9 type motion now wherein we would have to ask the Court to
10 review the proceedings before the grand jury so that the
11 Court can determine what the charges are.

12 If there is poor draftsmanship in the nomenclature
13 of the indictment just discovered now at this juncture in the
14 trial, then it may be incumbent upon your Honor to pursuant
15 to a Costello-type motion, inspect the grand jury minutes.

16 THE COURT: What is your suggestion, Mr. Levine?

17 MR. LEVINE: Your Honor, the government submits
18 that Count 1 of the indictment is perfectly proper, that even
19 if the defendants did cocaine instead of heroin, that it is a
20 variance between Count 2 and the proof at trial but not a
21 material variance to prejudice the defendants.

22 Mr. Rosenberg went on about all the different ways
23 in which cocaine is mixed rather than heroin. There is no
24 evidence of that, your Honor.

25 MR. ROSENBERG: I didn't say there was.

1 hblt 12

2 MR. LEVINE: And the government is going to argue
3 to the jury that what was involved here was heroin. All the
4 government is submitting to the Court is that the argument
5 that is going to be made on the facts by the defendants is not
6 necessarily a defense at law. There are many arguments that
7 are made by defendants in summation as to why they should acquit
8 the defendants. Not all the arguments are always a legal
9 defense, and the government is merely requesting the Court
10 that before it charges the jury as the defendants like, that
11 the government be given an opportunity to demonstrate to the
12 Court that that is not a material variance so that they do not
13 get the benefit of a legal defense of a charge that establishes
14 that argument as a legal defense. Not necessarily have to
15 take it away as an argument on the facts.

16 MR. WASHOR: We have a bill of particulars here,
17 I believe, don't we?

18 MR. LEVINE: And as far as the Costello-type
19 motion that Mr. Washor is arguing now, both the Court and the
20 government here have been through that river on a previous
21 case, and I think the law is clear that an indictment may not
22 be attacked on the ground of incompetent or insufficient evi-
23 dence and Costello specifically held that neither the Fifth
24 Amendment nor the supervisory power of the Court ought to be
25 utilized to dismiss and indictment on the grounds of

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2 insufficient or incompetent evidence, so I don't think that
3 that is really a problem here.

4 THE COURT: Let me ask you all this:

5 Suppose the case goes to the jury just on the
6 basis of the government's requests or comparable to it.
7 And the jury then comes back with a verdict of guilty. In
8 order to really come to grips with the legal consequences of
9 a variance, how are Court and counsel going to know what the
10 jury concluded the substance was? I have no immediate answer
11 to this problem, I am just throwing it up for consideration.
12 Because in the Court of Appeals, the defendants could
13 succeed on a variance theory, it seems to me, only if they
14 assume that the jury found the substance was cocaine and
15 not heroin and convicted them anyway.

16 But how are we going to know that?

17 MR. ROSENBERG: Your Honor raises an interesting
18 question. Let me go one step further.

19 What if the jury comes back and asks if they may
20 consider it cocaine and not heroin? Then your Honor has
21 to answer that.

22 THE COURT: You are hypothesizing a jury
23 listening to the charge, starting to deliberate, then send-
24 ing a question saying, "Well, what if we find it was cocaine
25 but not heroin; may we convict anyway?"

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2 MR. ROSENBERG: They may do that, because the
3 only proof of a narcotic drug is a residue of cocaine.

4 MR. WASHOR: There is more positive proof than
5 that.

6 MR. ROSENBERG: As to the cocaine?

7 MR. WASHOR: That's correct.

8 MR. LEVINE: There is also proof of heroin.

9 THE COURT: Yes, there is. There is circumstan-
10 tial evidence from which heroin --

11 MR. LEVINE: And direct evidence out of the
12 mouth of Yolanda Valdez Simpson, your Honor.

13 MR. WASHOR: I believe the Court in each and
14 every instance when she testified took the position that she
15 could not use the word heroin, but just "white powder" or
16 "substance." So if the record in any manner or form has her
17 using the word "heroin," that ought to be straightened out
18 so it is not read improperly.

19 MR. ROSENBERG: I recall very correctly as to
20 each and every witness, your Honor did not permit the use of
21 the word "heroin."

22 MR. LEVINE: Your Honor, the government will
23 stand by its recollection of the facts and argue to the jury
24 its recollection of the facts.

25 MR. WASHOR: This is a specific instruction by

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2 this Court. This is not a question of recollection. This is
3 not a question of testing one's memory. This Court took pains
4 to make a statement and interrupt witness after witness and
5 prohibit them from making the conclusory statement that
6 whatever they were dealing with is heroin. I did not read the
7 transcript seeking out if there was any error or mistake
8 made to the point where the word "heroin" is in there where
9 it should not be there. Clearly it was your Honor's intention
10 not to allow a witness who had not had a proper foundation
11 established with prior questioning to reach the conclusion that
12 they were dealing with heroin.

13 You restricted each witness at that moment in
14 time to use the words "white powder." Mr. Levine on
15 occasion with his question incorporated in his question to
16 the witness the word "heroin." But that does not obviate
17 what this Court's intention was and I do not believe that it
18 would be fair comment in light of that instruction if there
19 is some error in the transcript whether Yolanda Simpson said,
20 "Yes, I was dealing with heroin," and defense counsel, by
21 inadvertence, by accident, because they did not hear, for
22 whatever reason, did not raise their hands and say, "Judge,
23 I remind you again what you just said, it can't be the word
24 'heroin,' 'white substance.'

25 That was your intention; to change at this point

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2 would be unfair.

3 THE COURT: Let's focus on the question of --
4 this question of variance. There may be something to be
5 said for my deciding this issue before counsel sum up and
6 before I charge the jury. If it is quite clear that it is not
7 a -- it would not be a fatal variance, query as to whether or
8 not the jury should not be told that in the charge.

9 On the other hand, if it is equally clear that
10 it would be a fatal variance, then should not the jury be told
11 that in connection with the charge? Do any of you gentlemen
12 for the defense have any cases to show to me indicating that
13 it would be a variance?

14 MR. WASHOR: I am going to be totally candid. I
15 have done some work on this matter. I am under the impression
16 that in the substantive count, it is a definite variance but it
17 is not so as to the conspiracy.

18 You see, Judge, I can't play a game and bait people
19 into what could be error. That is my understanding of the
20 law. I believe that the second count of the indictment will
21 survive, but I do believe the conspiracy count -- I am put in
22 a very precarious position. I am an officer of the court, I
23 have to argue points of law to the best of my ability, I do
24 not want to hurt the accused, but in conscience, I prefer to
25 go into this case not seeking reversible error if there is any.

2 I believe that the law is quite clear. I believe
3 that the variance between the definition of cocaine and heroin
4 as to the substantive count is sufficient not to permit the
5 matter to stand but not so as to the conspiracy. Because
6 the underlying aspect of the conspiracy is the illegal agree-
7 ment, the particular definition of the narcotic does not carry
8 the same strength as does the substantive charge. Because in
9 the substantive charge, for example, you would be caused to
10 give the importation aspect. If we are going to be totally
11 candid, let the government acquiesce to the dismissal of the
12 second count and go ahead with the conspiracy. That's all we
13 have in this case anyway, but a conspiracy charge.

14 MR. LEVINE: Your Honor, the government doesn't
15 concede to dismiss a count without doing its legal research.
16 If it requires that summations not be given until tomorrow
17 morning, the government has no objection to it. It is the
18 government's position that it does not constitute a material
19 variance.

20 The 841(a)(1) relates to narcotic drug controlled
21 substances and contains some five schedules under that. The
22 penalties are the same, your Honor. It just does not seem that
23 the particular drug controlled substance that is ultimately
24 proved constitutes a material variance. There just doesn't
25 seem, your Honor, as there is any prejudice to the defendants.

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2 The penalty is the same.

3 THE COURT: And you make that point as to both
4 counts of the indictment?

5 MR. LEVINE: I do, your Honor, but I really would
6 prefer to do some legal research to see if there is a case
7 in point.

8 MR. WASHOR: I say the variance is fatal to the
9 substantive charge.

10 MR. ROSENBERG: Your Honor, Mr. Levine is basically
11 saying to your Honor that if they prove everything else that
12 is not in the complaint, then at the end they can move to have
13 the proof conform to the complaint as in a civil case.

14 I think the government is bound here. Somewhere
15 down the line they are bound, Judge. The whole position is
16 heroin and they should be bound by that.

17 All their proof, their overt acts and everything
18 else, all their indications, all their inferences, is heroin.

19 MR. LEVINE: Your Honor, we have a jury waiting.
20 Perhaps we --

21 THE COURT: I am inclined to think that this
22 should be researched further and we should plan on summations
23 tomorrow morning after we have all done some research on it,
24 including me, and I am in a position to rule on this, because
25 I think there is a great deal to be said from the point of

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2 view of counsel's summations, from the point of view of the
3 Judge's charge and from the point of view of the jury's
4 deliberations to have me resolve this question. Because, if
5 I do resolve it, if I tell you how I have resolved it and if
6 I then instruct the jury in accordance with my resolution,
7 whatever it may be, then in the Court of Appeals, you are all
8 going to know where you stand.

9 And I think it is a much clearer basis and I
10 don't know how I am going to come out on this, but I think
11 that we should all perhaps do the sort of research that Mr.
12 Levine has suggested.

13 MR. WASHOR: Judge, if I am correct, the heroin
14 statute requires a different statutory presumption of importa-
15 tion, if I am correct. I don't believe that is necessary in
16 a cocaine situation.

17 MR. LEVINE: Your Honor, under -- there is a head
18 note, your Honor, under Section 21 USC Section 841(a)(1) which
19 is the substantive crime to United States vs. Ramirez, a
20 Second Circuit case, 482 F. 2nd 807.

21 I think, your Honor, the issue may be resolved if
22 we could just get that case. The head note reads that that
23 indictment charged violations relating to both Schedule I and
24 Schedule II drugs whereas proof pertained only to cocaine.

25 A Schedule II drug did not establish variance or

CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, I am about to perform my principal function and charge you on the law in this case. We are coming close to the end of this partnership that I said to you and the other members of the panel, when you were first selected, that jurors and judges enter into under our system, and that is that we each have our independent but related functions to perform. I am about to perform mine, and then you will perform yours.

You jurors are the sole judges of the facts, but you must find those facts in accordance with the instructions on the law that I give you. This is the essence of the partnership under our law, and it has played a part of the legal system of this country since the Republic was founded some 201 years ago. It has come to us directly from the system of English law to which we owe and from where we have inherited many of our procedures.

Different systems pertain on the continent of Europe and in other countries and in other parts of the world. But for many hundreds of years it has been the tradition under the Anglo-American system of law that in any case where the liberty or the property of a citizen is in jeopardy in a court proceeding, he or she has the absolute right to have the issues of fact determined by a jury of fellow citizens.

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2 But those citizen jurors, in finding the facts,
3 must abide by and follow the instructions of the Court on the
4 law. Again, it is the essence of the partnership. And I
5 suggest to you that that partnership is intended to preserve
6 all of us from one of two possible tyrannies, the first one
7 being a possible tyranny of judges. Because if it were
8 possible for judges to not only declare the law but, whenever
9 they wished, to find the facts as well, then the risk that
10 arises would be one of judges too close to the Crown or to
11 some other form of government, or too far removed from the
12 common sense comings and goings of the populace, or too remote
13 in an ivory tower, or too bound by pride of position or some
14 other hardening of the arteries of the soul and the heart,
15 to really perform the system of justice as it should be
16 performed.

17 And so, in cases of this nature, citizen jurors
18 find the facts. But if it were possible for jurors to not
19 only find the facts but disregard rules of law or make up
20 rules of law as they go along, then we would run the risk of
21 that other tyranny, namely, a tyranny of the people them-
22 selves, for stability and order in society depend upon rules of
23 law which are declared by courts and are binding upon the
24 citizens.

25 If we each do our job correctly, if I charge you

correctly on the law, and if you accept those instructions on the law as you were bound by your oaths to do, and if you then find the facts on the evidence fairly and impartially and without bias or sympathy, then we each will have done our parts in this traditional and important partnership, and the ends of criminal justice will have been served in this case.

I would like to charge you on the law in the informal sort of manner in which I have been speaking to you most recently, but it is a somewhat complicated matter and I want to be sure to get it right, and I certainly cannot remember it all, and so from time to time, indeed for most of the time, I am going to be reading my charge to you. It may seem impersonal, but it is important that I get it right or do the best I can.

Before doing so, though, I do want to thank you, all of you, for your participation in this case. It has been suggested by older and more experienced judges, some of them, that thanks to jurors are not appropriate because you are performing a duty of citizenship and we should not be thanked for doing our duty. And yet I perceive a difference in the performance of one's duty. There is a difference, for example, between coming to court sessions on time, as you have done, and being chronically tardy. There is a difference between paying careful attention to the evidence and to counsel, as

you have done, and being inattentive. There is a difference, in other words, between caring and not caring, and this is a choice which we all make one way or another every day of our lives.

I am satisfied that you have worked hard in this case under adverse circumstances, and I do not hesitate to thank you for it.

I come now to the charge on the law.

You will soon undertake your final function as jurors, and here you do indeed perform one of the most sacred obligations of citizenship, acting as ministers of justice. You are to discharge this final duty in an attitude of complete fairness and impartiality, as was emphasized by me when you were selected as jurors and again just a moment ago, without bias or prejudice for or against the government or any defendant, as parties to this controversy.

This case is important to the defendants who are charged with serious crimes. It is equally important to the government, for the enforcement of criminal law is a matter of prime concern to the community and to its welfare.

Let me add this:

The fact that the government is a party entitles it to no greater consideration than that accorded to any other party in litigation. By the same token, the government is

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entitled to no less consideration. All parties -- government, corporations and individuals alike -- stand as equals before the bar of justice.

Your final role is to decide and pass upon the fact issues in the case. You are the sole and exclusive judges of the facts. You determine the weight of the evidence, you appraise the credibility of the witnesses, you draw the reasonable inferences from the evidence, and you resolve such conflicts as there may be in the evidence.

I shall later refer to how you determine the credibility of witnesses.

In aid of your recollection, you may at any time during your deliberations request the testimony to be read back to you or ask to examine certain exhibits.

Furthermore, at the conclusion of these instructions I shall give you each a copy of the indictment for your convenient reference during your deliberations.

My function, as I have said, is to instruct you as to the law, and it is your duty to accept these instructions as to the law and to apply them to the facts as you may find them.

With respect to any fact matters, your recollection and yours alone governs. As I have already told you, anything that counsel either for the government or for the defense may have said with respect to matters in evidence,

whether during the trial, in a question, in argument or in summation, is not to be substituted for your own recollection of the evidence. So, too, anything the Court may have said during the trial or may refer to during the course of these instructions as to any fact matter in evidence is not to be taken in place of your own recollection.

During the progress of the trial, on a number of occasions the Court may have admonished counsel on one side or the other. Such incidents are to play no part in your fact determination. The rights of the parties are governed by the evidence and the law and not by the personalities of the lawyers or that of the Judge.

During the trial I have sustained certain objections to evidence and overruled other objections. There have been conferences outside of your hearing on these matters, quite a few of them in fact. Place them all out of your mind. They dealt with questions of law. Attorneys are duty bound to make objections if they see fit. It is my duty to rule upon them. These activities have nothing to do with your determination of the facts.

The fact that I may have asked questions of witnesses from time to time does not indicate any feelings of mine about the facts one way or the other. I have no such feelings. My questions were intended only to clarify

the issue at hand.

What, then, does the evidence which you are to consider in your determination of the facts consist of? It is the testimony of witnesses who have appeared before you, together with the documents which have been received as exhibits by the Court and certain stipulations of counsel.

A further word on the nature of evidence:

The law recognizes two types of evidence, direct and circumstantial.

Direct evidence is where a person testifies to what he himself saw or heard, that which he has knowledge of by virtue of his senses.

Circumstantial evidence consists of proof of facts and circumstances from which in terms of common experience one may reasonably infer the ultimate fact sought to be established. Such evidence, if believed, is of no less value than direct evidence, for in either case the essential elements of the crime charged must be established by the government beyond a reasonable doubt.

Let me give you a homespun example of circumstantial evidence.

Suppose that some day when you came into the courtroom on this trial, the sun had been shining brightly outside, but the shades were drawn and you could not see what was

happening to the weather outside. And after we had been going for about an hour or so, the door of the courtroom opened and in came a gentleman wearing a dripping raincoat and carrying a dripping umbrella. Well, you cannot see directly what has happened to the weather outside, but from the appearance of the dripping raincoat and umbrella, you can logically and reasonably draw an inference from those observations that you can make to an additional fact, namely, what the weather is like outside.

Or for another example:

Robinson Crusoe coming to his tropic island, not certain whether there was anyone else on the island or not, but when he comes closer to the beach he sees a series of footsteps walking around the island. Well, that is circumstantial evidence from which he can reasonably infer the possible presence of someone else on the island. These are examples which are offered to you simply to illustrate the point.

The government in this case relies upon both the direct and circumstantial evidence to sustain its burden of proof.

Now, how are you to appraise or to weigh the evidence which has been presented? I mentioned at the very start of the trial, before you heard any evidence, that it

1 was important for you not only to listen but to look and
2 observe the witnesses as they testified. Perhaps you now
3 understand why I suggested this. Your determination of the
4 credibility of a witness very largely depends upon the
5 impression which he or she made upon you as to whether or not
6 he or she was giving an accurate version of what occurred.
7

8 It is frequently said to jurors that when you
9 walk into the courtroom and sit in the jury box while the
10 trial is going on or while you are deliberating in the jury
11 room, you have your common sense, your good judgment and
12 your experience with you.

13 The degree of credit to be given a witness should
14 be determined by the witness' demeanor, by his or her
15 relationship to the controversy and the parties, his or her
16 bias or impartiality, the reasonableness of his or her state-
17 ments, the strength or weakness of recollection viewed in the
18 light of all other testimony, and the attendant circumstances
19 in the case.

20 The question is, how did the witness impress you?
21 Did his or her version appear straightforward and candid or
22 did he or she try to hide some of the facts? Is there a
23 motive of any kind to testify falsely? In other words, what
24 you try to do, to use the vernacular, is to size a person up,
25 just as you would do in any important matter where you are

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2 undertaking to determine whether or not the person was truth-
3 ful, candid and straightforward.

4 In passing upon the credibility of a witness,
5 you may also take into account inconsistencies or contra-
6 dictions as to matters in his or her own testimony or any
7 admissions of false testimony or of false statements on prior
8 occasions.

9 I am not saying that there were instances of any
10 of these in the trial before you. I am simply giving you
11 illustrations of the sort of criteria to which you can look
12 in applying your common sense and judge the credibility of
13 witnesses.

14 There are specific instructions which I will give
15 you a little later on with respect to certain of the witnesses
16 who have appeared before you. But you must keep in mind that
17 the ultimate question for you to decide in passing upon
18 credibility is:

19 Did the witness from the witness stand tell the
20 truth before you in this courtroom? It is for you to say
21 whether his or her testimony at this trial is truthful in
22 whole or in part in the light of his demeanor, his or her
23 explanations, and all the evidence in the case. The fact
24 that a witness is a government employee does not require that
25 his or her testimony be given any greater weight or

consideration than that accorded to any other witness.

In appraising the credibility of all witnesses, you take into account the interest of the witness, if any, motives and other factors which may reasonably be considered to influence or color one's testimony.

If you find that any witness has wilfully testified falsely to any material fact, you may reject all of the testimony of that witness, or you may accept such part or portion as commends itself to your belief as credible, or which you may find was corroborated by other independent evidence in the case.

You are not to be swayed by the number of witnesses which one particular side produces. It is the quality and not the quantity of the evidence which is important.

The defendants have not testified in this case. That is their absolute right, and in no respect may such failure to testify be considered by you as any evidence against them or any of them or as a basis for any presumption or inference unfavorable to them or any of them.

You must not permit such fact to weigh against them or any of them, nor should it enter in any way whatsoever into your deliberations or discussions.

Before we consider the precise charges against the defendants on trial before you, some additional preliminary

matters should be noted.

Count 1, the conspiracy count of the indictment, charges that the defendants conspired with each other or with one or more of certain other persons named therein to violate the federal drug control laws.

Count 2, the substantive count, as we have called it, charges the defendants actually committed the crime referred to in that count, the alleged distribution and possession with intent to distribute of certain narcotic substances.

The indictment uses the word "count." Counsel have used that word in their arguments. I use it in my words to you today. It is a technical lawyer's word. The word "count" in a criminal indictment means charge or accusation. A count in an indictment is in effect an accusation that the defendant has violated the law in a particular way.

If an indictment contains more than one accusation, then it contains more than one count.

In the present indictment the defendants are all charged in the two counts in the indictment.

On this trial you will be concerned only with the guilt or innocence of the defendants before you--Mr. Knuckles, Mr. Brown and Ms. Smith. The fact that other persons named in the indictment are not on trial with these defendants is

not to enter into your deliberations in any way, nor may you draw any inference for or against the defendants or against the government or anyone else by reason of that fact.

You are aware from her testimony that Yolanda Valdez Simpson, also known as Yogi, has pleaded guilty to the conspiracy count, to the first count of the indictment. That was her personal plea and hers alone, and that fact may not be considered against the defendants here on trial, nor may any adverse inference be drawn against them by reason of the plea of Ms. Simpson. Guilt is personal.

The guilt or innocence of each of the defendants here on trial must be determined solely upon the evidence presented against them individually or the lack of evidence. The charges against them and each of them stand or fall upon the proof or lack of proof as to them, and not as to any co-defendant or anyone else. That is a most important principle of our criminal law. I shall return to it later in these instructions.

There are certain principles of law which apply to every criminal case and to which I made reference and emphasized at the time of your selection as jurors. I repeat them now.

The indictment is merely an accusation, a charge. It is not evidence or proof of a defendant's guilt. No

weight whatsoever is to be given to the fact that an indictment has been returned against these defendants. They and each of them have pleaded not guilty. Thus, the government has the burden of proving the charges against them and each of them beyond a reasonable doubt.

The defendants do not have to prove their innocence. On the contrary, they are presumed to be innocent of the accusations contained in the indictment. This presumption of innocence was in their favor at the start of the trial, it continued in their favor throughout the entire trial, it is in their favor even as I instruct you now, and it remains in their favor during the course of your deliberations in the jury room. It is removed only if and when you are satisfied that the government has sustained its burden of proving the guilt of a particular defendant beyond a reasonable doubt.

The question that naturally arises is:

What is a reasonable doubt?

The words almost define themselves. It is a doubt founded in reason and arising out of the evidence in the case or the lack of evidence. It is a doubt which a reasonable person has after carefully weighing all the evidence.

Reasonable doubt is a doubt which appeals to your reason, your judgment, your common sense and your experience.

It is not caprice, whim, speculation, conjecture or suspicion. It is not an excuse to avoid performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say you are not satisfied of the guilt of a particular defendant, that you do not have an abiding conviction of a defendant's guilt-- in sum, if you have such a doubt as would cause you as prudent persons to hesitate before acting in matters of importance to yourselves -- then you have a reasonable doubt, and in that circumstance it is your duty to acquit the defendant under consideration.

On the other hand, if after such a fair and impartial consideration of all of the evidence you can candidly and honestly say you do have an abiding conviction of a defendant's guilt, such a conviction as you would be willing to act upon in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and in that circumstance it is your duty to convict the defendant under consideration.

One final word on this subject:

Reasonable doubt does not mean a positive certainty or beyond all possible doubt. If that were the rule, few persons, however guilty they might be, would

be convicted. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty.

In consequence, the law in a criminal case is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt.

I turn now to the law that is the subject of the indictment and the difference between the two counts in the indictment.

The counts in the indictment charge violation of the Drug Abuse Prevention and Control Act. This law was enacted by Congress in an effort to combat the illegal importation, distribution, possession and improper use of various drugs which have a substantial and detrimental effect upon the health and general welfare of the American people.

Under that Act, various drugs are classified as controlled substances and are listed in schedules. These schedules include narcotic drugs as well as other drugs.

Heroin, which is a narcotic drug, is included in Schedule I as a controlled substance.

The first count of the indictment charges Mr. Knuckles, Mr. Brown and Ms. Smith, together with other: named

1 individuals, as being engaged in a conspiracy to violate
2 the drug control law. I shall refer to the first count of
3 the indictment as the conspiracy count.
4

5 The second count, to which I shall refer as the
6 substantive count, charges the defendants with the commission
7 of an actual violation of the law which makes it unlawful for
8 one to distribute or possess with intent to distribute a
9 controlled drug.

10 A conspiracy to commit a crime is an entirely
11 separate and different offense from the substantive crime,
12 which is the objective of the conspiracy. The essence of the
13 crime of conspiracy is an agreement or understanding to
14 violate other laws. The conspiracy, which is sometimes
15 referred to as a partnership in crime because it involves
16 collective or organized action, presents a greater potential
17 threat to the public interest than the illicit activity of
18 a single individual.

19 Group association or organized activity renders
20 detection more difficult than in the instance of a single
21 or lone wrongdoer. Thus, because of the special dangers to
22 the community of conspiracies to distribute controlled drugs,
23 Congress enacted as part of a drug control law a provision
24 that a conspiracy to violate the Act constitutes a separate
25 crime in addition to the substantive offense.

Count 1 of this indictment is based upon a section of the law which provides in pertinent part:

"Any person who conspires to commit any offense in violation of the Drug Control Act is guilty of a crime."

In the present case, the defendants are accused of conspiring to violate the Drug Control Act.

The actual violation of the Act, which is charged in Count 2 of the indictment, the substantive crime, is based upon another part of the Act which in pertinent part reads:

"It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

That charge appears in Count 2 of the indictment. It relates to the alleged distribution or possession with intent to distribute of approximately 2,000 quarter bags of heroin in New York on or about October 1, 1976.

Against this background of the applicable law, I am going to turn to a consideration of the specific counts of the indictment. Since the essential elements which the government must prove in order to sustain the specific charges are given for each count, we shall consider each count, Counts 1 and 2, the conspiracy and the substantive count, separately.

Thus, as to the first or conspiracy count

the grand jury charges as follows:

"From on or about the 1st day of August, 1976 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Marion Knuckles, a/k/a 'Glenn,' Jane Doe, a/k/a 'Gwen'-- who is not before you -- "Raymond Brown, Rose Smith and Yolanda Valdez Simpson, a/k/a 'Yogi,'" -- who is not before you as a defendant -- "the defendants, and others to the grand jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate" -- certain sections of the Federal Control Laws. Those sections are set forth in the indictment itself.

Quoting again from the indictment:

"It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the grand jury unknown, in violation of" -- certain sections of the law, which are set out in the indictment.

I say to you again that the fact that the charges appear in the indictment and that I have read the indictment to you in the course of these instructions does not in any way

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constitute evidence of guilt.

In order to convict any of these three defendants on trial, the government must prove beyond a reasonable doubt the following essential elements with respect to conspiracy:

1. The existence of the conspiracy charged in the indictment, that is, an agreement or understanding to violate those provisions of law which prohibit the distribution or possession with intent to distribute narcotic substances.

2. That the defendant under consideration knowingly associated himself or herself and participated in that particular conspiracy.

3. That at least one of the conspirators knowingly committed at least one overt act in furtherance of the conspiracy within the Southern District of New York.

I will come to the concept of an overt act a little later on, but within the context of this particular case I charge you that the Borough of Manhattan falls within the Southern District of New York.

Now let us consider the first element necessary to constitute a conspiracy.

The idea of a conspiracy is simple. A conspiracy is a combination, an agreement, an understanding, of two or more persons to accomplish by concerted action a criminal or

1 unlawful purpose, in this instance to distribute or possess
2 with intent to distribute a controlled substance, namely,
3 a narcotic drug.
4

5 The gist of the crime of conspiracy is the unlaw-
6 ful combination or agreement to violate the law. The success
7 or failure of the conspiracy is immaterial to the question of
8 the guilt or innocence of a conspirator.

9 To establish a conspiracy, the government is not
10 required to show that two or more persons sat around the table
11 and entered into a solemn pact orally or in writing stating
12 that they had formed a conspiracy to violate the law or the
13 details or the means by which its object was to be achieved.

14 Common sense tells you that when persons in fact
15 undertake to enter into a criminal conspiracy, much is left
16 to the unexpressed understanding. It is rare that a conspiracy
17 can be proved by direct evidence. What the evidence must
18 show in order to establish that a conspiracy existed is that
19 two or more persons in some way or manner, through any con-
20 trivance, impliedly or tacitly, came to a common understand-
21 ing to violate the law or to accomplish an unlawful plan.

22 Now, the period of time charged in the indictment
23 runs from on or about August 1, 1976, to May 5, 1977. It is
24 not necessary for the government to prove that the conspiracy
25 started and ended on those specific dates. A conspiracy
continues for as long as the evidence shows the conspirators

intended to continue it.

It is sufficient if you find that in fact a conspiracy was formed and that it existed for some substantial time within the period set forth in the indictment and at least one overt act was committed during that period.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged co-conspirators which were done to carry out an apparent criminal purpose. The adage "Actions speak louder than words" may be applicable here.

Usually the only evidence available is that of disconnected acts and conduct on the part of the alleged individual co-conspirators, which acts and conduct, however, when taken together in connection with each other and considered as a whole, permit an inference that a conspiracy existed as conclusively as by direct proof.

You must first determine whether or not the proof establishes the existence of the conspiracy as charged in the indictment. In deciding this first element, you must consider all the evidence which has been admitted with respect to the conduct, acts and declarations of each alleged co-conspirator and such inferences as may reasonably be drawn therefrom.

It is sufficient to establish the existence of

the conspiracy if, from the proof of all the relevant facts and circumstances, you find beyond a reasonable doubt, as I have defined that phrase to you, that the minds of at least two alleged co-conspirators met in an understanding way to accomplish, by the means alleged, one or more objects of the conspiracy as charged in the indictment.

If you do conclude that the charged conspiracy did exist, you must then next determine the second element, namely, whether the defendants on trial or any of them was a member of the conspiracy. Their participation in the conspiracy, if you have first found that a conspiracy existed, must be established by the independent evidence of their own acts, statements and conduct, as well as those of the other alleged co-conspirators and the reasonable inferences to be drawn therefrom.

To find any one of these defendants in this case guilty of conspiracy, you must find beyond a reasonable doubt that, aware of the existence of the conspiracy and its purposes, he or she was a willing participant with the intent to advance its purposes.

To become a member of a conspiracy, a particular defendant need not know all the other members, their respective roles in or all the details of the conspiracy. Each member may perform separate and distinct acts at different

times. Some conspirators may play major roles while others may play minor roles.

In short, it is not required that a person be a member of the conspiracy from its very start. A single act may be enough to draw one within the ambit of the conspiracy, provided the proof establishes that, aware of the conspiracy, he or she knowingly associated himself with it and participated therefrom.

However, mere knowledge or acquiescence in the object or the purpose of the conspiracy is not sufficient. More is required. This something more is generally described as a stake in the venture or a stake in its outcome. While a financial stake in the venture is not essential, if you do find that a particular defendant had such an interest, this is a factor that may be considered by you in deciding whether or not a defendant was a member of the conspiracy, if, again, you have first found that a conspiracy existed.

One may join an existing conspiracy at any point during its progress, and, however limited his or her role, if he or she in fact joined it and participated, then he or she is responsible for all that had been done even before he or she joined and that may be done thereafter in furtherance of its objectives.

A conspiracy has sometimes been described as a

partnership in criminal purposes. Simply stated, by becoming a partner, an individual assumes all the previous liabilities of the partnership. Once you are satisfied beyond a reasonable doubt that a conspiracy existed and that the defendants on trial or any one of them became a member, then the acts and declarations of any other person found to be a member, made during the pendency of the conspiracy and in furtherance of its objectives, are considered the acts and declarations of the defendant.

Thus, if you find a conspiracy as charged existed, of which the witness Ms. Simpson was a member, then the distribution of heroin or possession of heroin with intent to distribute, or any sale of heroin made by Ms. Simpson or any discussion of any act to further or arrange such a distribution or sale, would be binding upon Mr. Knuckles, Mr. Brown or Ms. Smith, the defendants on trial, if you further find that they or any of them were in fact members of the conspiracy which you have also found in fact to exist.

And this would be so even if such acts were committed when the defendants on trial were not actually present.

Summing it up in a simple way, if in fact there was a partnership in crime, each partner acts and speaks for the others, in the furtherance of the partnership business,

whether or not the other was present.

The existence of the conspiracy and one's membership therein may be established by direct evidence or by circumstantial evidence. Conspiracies are rarely susceptible of proof by direct evidence. Usually they are established as a matter of reasonable inference based upon circumstantial evidence.

As I charged you earlier, direct evidence is where a person testifies to what he saw or heard and observed and what he knows of his own knowledge.

Circumstantial evidence, as I have also said, is where facts are established from which, in terms of common experience, one may logically infer other facts that are sought to be established. And I endeavored to give you two examples of circumstantial evidence.

I charge you that circumstantial evidence, if believed, is of no less value than direct evidence, for as I have also said, in either case, whether circumstantial or direct evidence is being offered, you must be convinced beyond a reasonable doubt as to the guilt of any particular defendant.

Whether a particular defendant knowingly and intentionally participated in the claimed conspiracy presents issues of fact. Clearly these are issues which concern what

1 goes on in an individual's mind. Medical science has not
2 yet devised an instrument whereby we can go back to the time
3 of the occurrence of events and determine what was then a
4 person's intent or knowledge. These issues must of necessity
5 be determined from one's acts, his conduct, surrounding
6 circumstances, and such inferences as may reasonably be
7 drawn therefrom.
8

9 I wish to add one word of caution. Mere
10 association of a defendant with an alleged conspirator or
11 conspirators does not establish his participation in a
12 conspiracy, assuming you should find a conspiracy did in fact
13 exist.

14 So, too, mere knowledge by a particular defendant
15 of a conspiracy or any illegal act on the part of other
16 alleged co-conspirators is not sufficient to establish a
17 particular defendant's membership.

18 Before the inference may be drawn that a defendant
19 was a member of a conspiracy, you must, as I have already
20 instructed you, be satisfied from the evidence presented by
21 the government that this particular defendant knowingly
22 associated himself with the conspiracy with the specific
23 intent to aid the accomplishment of its unlawful purposes.

24 It is important to remember that in deciding this
25 question of association and participation, you must look only

at words and deeds of a defendant whom you were considering in deciding whether that individual has been shown by the evidence to have been a member of the conspiracy.

The actions of others do not determine whether a particular individual is a participant. The words and deeds of each particular defendant that you are considering and the legitimate inferences therefrom alone will determine whether he is a member of the conspiracy.

Proof of a particular individual's participation must be substantial and not slight. Thus, in considering whether a particular defendant was a member of the conspiracy, you must do so independently of the acts of the other alleged co-conspirators. In other words, whether the defendants or any one of them was in fact a member of the conspiracy or joined the conspiracy must be determined on the evidence which you accept as to his or her own actions, conduct, statements and declarations, if any, his or her own connection with the acts in aiding all the other alleged conspirators, and not other independent acts and statements of anyone else.

You are the sole judges of the evidence on these points.

I have already mentioned the third essential element of the crime of conspiracy is that an overt act intended to effect the object of the conspiracy be committed

by at least one of the co-conspirators after the unlawful agreement has been made.

An overt act is a legal phrase that lawyers use, but it has a well-recognized meaning.

An overt act is any step, action or conduct which is taken to achieve, accomplish or further the objective of the conspiracy. The purpose of requiring proof of an overt act is that, while parties may conspire and agree to violate the law, yet they may change their minds and do nothing to carry it into effect, in which event it will not constitute an offense.

An overt act need be neither a criminal act nor the very crime which is the object of a conspiracy.

Now, in this case the overt acts listed in the indictment are as follows:

"1. On or about August 16, 1976, Marion Knuckles, a/k/a 'Glenn,' the defendant, had a telephone conversation concerning the conditions in the street for selling heroin."

And I am reading from the indictment now.

"2. In or about October, 1976, Marion Knuckles, a/k/a 'Glenn,' Jane Doe, a/k/a 'Gwen', and Raymond Brown delivered a quantity of quinine and bonita to the defendant Yolanda Valdez Simpson in the vicinity of

1160 Fifth Avenue, New York, New York.

"3. In or about October, 1976, Marion Knuckles, a/k/a 'Glenn', and Jane Doe, a/k/a 'Gwen', the defendants, delivered a quantity of heroin to Yolanda Valdez Simpson, the defendant, in the vicinity of 1160 Fifth Avenue, New York, New York.

"4. In or about October, 1976, Marion Knuckles, a/k/a 'Glenn', Raymond Brown, Rose Smith and Yolanda Valdez Simpson, diluted heroin with quinine and bonita and placed the diluted heroin in approximately 2,000 quarter bags of heroin hydrochloride in the vicinity of 626 Riverside Drive, New York, New York.

"5. In or about October, 1976, Marion Knuckles, a/k/a 'Glenn', gave Yolanda Valdez Simpson approximately \$.400.

"6. On or about October 12, 1976, Yolanda Valdez Simpson had a telephone conversation concerning an argument with the defendant Marion Knuckles, a/k/a 'Glenn', about the payment to her of additional money for preparation of the heroin for distribution in Overt Act Number 4."

Those are the overt acts set forth in the indictment, and you will observe that some of these overt acts refer to criminal conduct allegedly the object of the conspiracy.

2 However, other overt acts appear on the surface
3 to be quite innocent. Thus, Mr. Knuckles, for example, is
4 described as having engaged in a telephone conversation.
5 Telephone conversations are not in and of themselves
6 criminal conduct. But if, as the government charges, these
7 phone calls were for the purpose of furthering a distribution
8 of narcotics, then they shed their outward innocent appear-
9 ance and become overt acts to further the purpose of an
10 illegal enterprise.

11 It is not necessary for the government to prove
12 that each member of the conspiracy committed or participated
13 in a particular overt act, since the act of any one done in
14 furtherance of the conspiracy becomes the act of all other
15 members. That assumes, of course, that you have found in
16 the first place that a conspiracy existed, and secondly,
17 with respect to any particular defendant, that he or she was
18 in fact a member of the conspiracy.

19 The government is not required to prove each of
20 the overt acts alleged in the indictment, nor indeed is the
21 government required to prove any of those precise overt acts
22 referred to in the indictment. It is sufficient in law if
23 the government proves the commission of at least one overt
24 act, as I have defined that term, in furtherance of the con-
25 spiracy, at or about the time alleged and within the Southern
District of New York--and, as I have charged you, the Borough of

Manhattan falls within the Southern District of New York.

As reflected in a prior charge I have given you, I would simply reiterate that with respect to the times alleged in the indictment with respect to the conspiracy, it is sufficient if you find that in fact the conspiracy was formed and existed within the period set forth in the indictment and that at least one overt act was committed in furtherance thereof within that period and within the Southern District of New York.

To sum up: Under the conspiracy count, in order to convict the defendants or any one of them, you must find beyond a reasonable doubt:

1. The existence of the conspiracy as charged;
2. A knowing participation in that conspiracy by the particular defendant you have under consideration; and
3. The commission of an overt act in the Southern District of New York by a co-conspirator in furtherance of the conspiracy.

Please remember that, as I have said previously, you are considering the defendants in this case, and the guilt of each defendant is a personal question; that is to say,

with respect to the guilt of any defendant, the government must prove each of the three elements I have just referred to beyond a reasonable doubt.

I have already instructed you on the meaning of reasonable doubt. If each of the necessary elements has been so proved as to a particular defendant, then you must convict him or her of conspiracy.

On the other hand, if any one of the elements has not been so proved as to a particular defendant, then you must acquit that defendant of conspiracy.

Although the indictment charges a single conspiracy it would be possible on the evidence to find separate conspiracies, one relating to the distribution and possession of 2,000 quarter bags of narcotics which are processed in the 626 Riverside Drive apartment of Yolanda Valdez Simpson, and the other relating to 500 quarters of a substance which the government's witness, Betty McFarland, says defendant Mr. Knuckles gave to her for distribution and which she subsequently returned to defendant Brown to give back to Mr. Knuckles.

I have said it would be possible for you to find that these transactions comprised two separate conspiracies. It is also possible for you to find that they formed a part of the same conspiracy.

Whether or not there was one conspiracy or two conspiracies or no conspiracy at all is a fact for you to determine on all the evidence and in accordance with these instructions. Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment, unless one of the several conspiracies which is proved is the single conspiracy which the indictment charges. What you must do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find that no such conspiracy existed, then you must acquit. However, as I have said, if you are satisfied that such a conspiracy existed, you must determine who were the members of that particular conspiracy.

And if you find that a particular defendant is a member of another conspiracy not the one charged in the indictment, then you must acquit that defendant. In other words, to find a defendant guilty, you must find that he or she was a member of the conspiracy charged in the indictment and not some other conspiracy.

It follows from what I have said that you will not consider any act or declaration against any defendant unless you find beyond a reasonable doubt that the person doing the act, making the declaration, was a member of the same conspiracy as was that defendant and that the conspiracy

you have found was the conspiracy alleged in the indictment.

As I have also said, in determining whether any particular defendant was a party to the conspiracy alleged in the indictment, each is entitled to individual consideration of the proof respecting him or her, or the lack of such proof, in proving any evidence of his or her knowledge or lack of knowledge, his or her status, his or her participation in conversation and his or her participation in the plans, schemes or arrangement alleged in the indictment or the province of that plan.

That completes my charge on the conspiracy. I am about to turn to the substantive count of the indictment, but before I do that, why don't we all, including me, just sit back and relax and stretch for a moment.

(Pause.)

Turning now to the substantive count, which is Count 2 of the indictment, in that count the grand jury charges that:

"On or about the first day of October, 1976, in the Southern District of New York, Marion Knuckles, a/k/a 'Glenn,' Jane Doe, a/k/a 'Gwen', Raymond Brown, Rose Smith and Yolanda Valdez Simpson, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I controlled substance, to wit,

approximately 2,000 quarter bags of heroin hydrochloride."

I have already read to you the law upon which this substantive violation is based, but let me read it to you again. The law provides in pertinent part:

"It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute a controlled substance."

In order to find the defendant or any of them guilty of this count, the government must establish beyond a reasonable doubt:

1. That on or about the date charged thereon they distributed, or possessed with intent to distribute, a narcotic controlled substance.

2. That they did so knowingly or intentionally. The second element means that the defendant knew what he or she was doing, but the distribution or possession with intent to distribute was deliberate and purposeful; that the acts or conduct were calculated and were not due to inadvertence or mistake.

3. That the substance involved was in fact a narcotic controlled substance.

I charge you as a matter of law that both heroin and cocaine are narcotic controlled drugs. That leads me to a particular instruction which I must give you.

There have been suggestions in this case that the particular substance which forms a part of the transactions

and activities alleged in the indictment constituted cocaine and not heroin. I charge you that the statute under which this indictment is brought prohibits the distribution or possession with intent to distribute of certain controlled narcotic substances. And the conspiracy count in this indictment refers to the same underlying statute.

I charge you that both heroin and cocaine are controlled narcotic substances within the statute, and I charge you further that if you find that the government has proved beyond a reasonable doubt each of the elements necessary to constitute a conspiracy as I have just given it to you, you find that each of those elements has been established beyond a reasonable doubt, then if you further find that the substance was not heroin but was cocaine, that particular fact is of no legal significance, and that is because the statute prohibits the distribution or possession with intent to distribute of either substance. That is equally true. I charge you, with respect to the substantive count.

If you find that each of the necessary elements in the substantive count have been proved by the government beyond a reasonable doubt, as I have defined that term to you, then if you make the additional finding that the substance in question was not heroin but was cocaine, that is of no legal significance.

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In saying that to you, I am not suggesting for a moment whether you should find that the elements have been established or whether you should find that the substance in question was heroin or cocaine or any other substance. Those fact questions are entirely for you to decide. I am simply instructing you as a matter of law that if the elements are established it would make no difference if you make the further finding that the substance was not heroin but was cocaine.

To return to the substantive count, the three elements are, again:

1. That on the date charged, defendants or either of them, any of them, distributed or possessed with intent to distribute a narcotic controlled substance;
2. That they did so knowingly or intentionally;
- and
3. That the substance involved was in fact a narcotic controlled substance.

A few words about what is meant by distributing or possessing with intent to distribute.

You will note that first element of the offense consists of either distribution or possession with intent to distribute a narcotic drug. The word "distribution" is used in its ordinary sense. It simply means to transfer, to pass

on or to hand over to another.

The word "possess" means to have something within your control.

This does not necessarily mean that you must hold it physically. As long as an object is under your control, you possess it.

A further instruction on the word "possess."

Possession may be of two types: actual or constructive.

Actual possession means that a defendant knowingly has personal, manual or physical control of the narcotics.

Constructive possession exists where the narcotics are in the physical possession or being handled by another person, but the defendant, the person alleged to have constructive possession, has the power to exercise control over the narcotics or their distribution, their movement, or to set the price for their sale or to cause their delivery.

So, too, one who has a working relationship with another, who has physical custody of narcotics, so as to cause or effect their delivery to a prospective purchaser in consummation of the sale, may be said to have constructive possession of the narcotics.

In this connection, the word "intent" refers to a person's state of mind. So the term "possess with intent to

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1
2 distribute" means to control an item with the state of mind
3 or purpose to transfer or pass that item or deliver it to
4 another person. That purpose may involve a contemplated
5 sale, but a sale is not required.

6 However, in this case the government contends
7 that the possession with intent to distribute was to effect
8 an ultimate sale.

9 The second element of the substantive offense
10 requires that the government prove beyond a reasonable doubt
11 that the defendants and each of them distributed or possessed
12 with intent to distribute a narcotic controlled substance
13 unlawfully, wilfully and knowingly.

14 Now, what do these particular words mean?

15 Knowingly and wilfully mean deliberately,
16 they mean intentionally. In other words, knowingly and
17 wilfully mean that a defendant distributed a narcotic sub-
18 stance or possessed it with knowledge that he was doing so,
19 that he intended to distribute such a substance or possess
20 it deliberately and in the free exercise of his will.

21 The words knowingly and wilfully are opposed to
22 and contrast with the idea of inadvertence or mistake.

23 In order to prove this element, you may take into
24 consideration all the facts and circumstances shown by the
25 evidence, including the exhibits, and to determine from all

such facts and circumstances whether the requisite knowledge and intent were present at the time in question.

Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.

As to the third element, the indictment charges and alleges that the narcotic drug controlled substance was heroin. And I have just instructed you as a matter of law that heroin is a narcotic drug controlled substance, and you must find beyond a reasonable doubt that the substance in issue was a narcotic controlled substance as charged. But in that regard I reiterate the charge just given, that what the law prohibits is the distribution or possession with intent to distribute of a controlled narcotic substance.

Heroin and cocaine are both such substances. It is not necessary that the nature of the substance be proved by direct evidence. There need be no sample placed before you, nor need there be testimony by qualified chemists, as long as the evidence furnishes grounds for concluding beyond a reasonable doubt that the material in question was in fact a narcotic controlled substance.

There are several categories of circumstantial evidence which you may consider in determining whether a given defendant possessed a narcotic drug as charged in the substantive count. I say you may consider such categories of

circumstantial evidence. Whether or not you do so is entirely up to you as finders of the fact. Such possible categories of circumstantial evidence include testimony of someone who personally tested samples of the powder in question, or the secrecy or deviousness, if any, with which the transactions were handled or the fact that the substance in which they were dealing was a white powder substance or the high prices paid in cash for the substance. It is entirely up to you.

If upon all the evidence you are satisfied that the defendants or any one of them had possession of a quantity of narcotic, that the defendant knew that it was a narcotic controlled substance and further find that the government has established beyond a reasonable doubt the essentials and the essential elements of the crime as I have just given them to you, that will be sufficient to convict a particular defendant on the substantive count.

I am not going to outline in detail the evidence and all the contentions upon which the parties rely. Counsel have summed up extensively. To review in detail the testimony of each witness will be unnecessary.

The government, as I have said, must establish its burden on each and every element of the conspiracy and substantive counts as to each and every defendant. It relies

1
2 upon the testimony of Yolanda Valdez Simpson and certain
3 allegedly corroborative witnesses and tape recordings and
4 other evidence, in order to establish the conspiracy under
5 Count 1 and the substantive charge under Count 2.

6 In addition to the foregoing, the government
7 relies upon circumstantial evidence to support its charges.
8 The defendants challenge the government's case. They rely
9 upon their presumption of innocence in their favor.

10 I have already charged you on that presumption
11 and its effect. The defendants are under no obligation to
12 put in any evidence whatsoever. They are under no obliga-
13 tion to pursue or initiate any particular line of inquiry on
14 cross examination of the government witnesses. They are
15 entitled, as I say, to rely upon their presumption of inno-
16 cence.

17 They point to the contradictions in the evidence
18 offered by the government witnesses and the absence of
19 evidence of certain points which they urge to be significant.
20 They attack the credibility of the principal witnesses
21 against them. They contend that the government's case does
22 not establish guilt beyond a reasonable doubt as to any of
23 the charges.

24 The defendant Brown has called Mr. Gray, his
25 employer in the cab business, as a witness on his behalf.

I have not, as I have said, adverted to all the evidence upon which the government and the defendants rely to support their respective contentions. All evidence, whether or not I have referred to it, is important and must be considered by you.

If by any chance I have made reference to any evidence which does not agree with your recollection, you are to disregard such references by me, and I emphasize the importance of this to you as strongly as I know. Always it is your recollection that governs.

You are called upon to decide the fact issues here which will require you to pass upon the credibility of witnesses. Previously, as you will recall, I instructed you generally on how to determine the credibility of witnesses and how to assess the significance of evidence. I shall now give you further instructions concerning types of witnesses and particular types of evidence which are present in this case.

Ms. Simpson has testified that she was a participant and an accomplice in the conspiracy charged in the indictment and in the substantive offense. She has pleaded guilty to the conspiracy charge against her, and as I have already noted, that plea on her part is personal, is binding only upon her, and cannot be considered against any of the other defendants.

As I have noted, she alleges that she was a participant. It is up to you to accept or reject that testimony.

If you accept it, she is characterized as an accomplice. In certain types of crime the government of necessity is compelled to rely upon the testimony of accomplices. Otherwise it would be difficult to detect and to prosecute some wrongdoers, and this is particularly true in conspiracy cases.

Often the government has no choice in the matter, it must take the witnesses and the transactions as they are.

There is no requirement in federal criminal law that the testimony of an accomplice be corroborated. It by no means follows that simply because she is an accomplice she is not capable of giving a truthful version of events.

A conviction may rest upon the uncorroborated evidence of such a witness if it is found credible by you as finders of the fact. However, the testimony of a witness who is an alleged accomplice or acknowledged accomplice should be viewed with great caution and scrutinized carefully.

The question, I repeat, in this case is:

Did Ms. Simpson tell the truth before you?

That is for you to judge.

Thus, you are at liberty to consider what weight,

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if any, should be given to the defense argument that either this witness or other government witnesses may color their testimony in the hope that a judge may give them recognition for such cooperation.

In the case of Ms. Simpson's testimony and that of other government witnesses as well, the question that arises is whether such witness slanted her testimony in the hope that such a witness could secure more favorable treatment at the time of sentence. That question and all questions concerning credibility are for you and you alone to decide. If you find that the testimony of such a witness or any witness was deliberately untruthful, then you should unhesitatingly reject it.

On the other hand, if you are satisfied that such witnesses gave truthful versions of events, that upon the totality of the evidence the government has sustained its burden of proof as outlined in these instructions, then you have sufficient cause upon which to convict.

You have also heard the testimony of Agent Brophy. As I have said to you before, the fact that this agent is a law enforcement officer does not require that you give his testimony greater weight or credence than that accorded the testimony of any other witness. His credibility is to be judged by the same standards applied to other

witnesses who testified, taking into account their manner, demeanor, and other factors which bear on credibility.

If you find, as I have said, that any witness has wilfully testified falsely to any material fact, you have a right to reject the testimony of that witness in total or you may accept only that part or portion which you believe or which you may find corroborated by other evidence.

There has been testimony that the defendant, Mr. Knuckles, made a statement at the time of his arrest. Conduct of the defendant, including statements knowingly made and facts knowingly done, upon being informed that a crime has been committed or upon being confronted with a criminal charge, may be considered by the jury in the light of all other evidence in the case in determining guilt or innocence.

When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. Such evidence may of course be considered only against that particular defendant and not against any other defendant.

Whether or not evidence as to a defendant's voluntary explanation or statement points to a consciousness

of guilt and the significance to be attached to any such evidence are matters exclusively within the province of you as the jurors. And the jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witness or producing any evidence.

There has been testimony that defendant Rose Smith made a statement at the time of her arrest in which she admitted involvement in the diluting and packaging of heroin at 626 Riverside Drive. With respect to that statement by the defendant Smith, I have the following instructions:

If you find that the defendant Smith did make the statement and made it voluntarily and knowingly, then you may give the statement such weight as against her, and against her alone, as you believe it deserves, after considering all the circumstances which were brought out in the evidence.

You will recall hearing telephone conversations which Warren Sims recorded while talking with various persons, including the defendant Mr. Knuckles. As I explained to you when you were being chosen, the use of these devices in the manner described in this case is a proper investigative technique. That is so, essentially because Warren Sims, who

was a participant in the conversations, consented to have them recorded.

In connection with these recorded conversations, the government has introduced transcripts purporting to accurately portray them. However, transcripts of the tapes in evidence that are before you are not evidence themselves. They are merely transcriptions of what appears on the tape recordings which you have heard. They are no better than the tapes upon which they are based. It is for you to decide whether the transcripts correctly present the data set forth in the tape recordings upon which they are based.

You are to determine the facts on the basis of all the evidence, direct evidence, evidence elicited on cross examination, the exhibits, and the stipulations.

For the government to prevail, it must, with respect to each count, prove the essential elements by the required degree of proof, as already explained in these instructions. If it succeeds on a particular count as to a particular defendant, your verdict should be guilty, and if it fails, it should be not guilty.

You must consider each count separately and render a separate verdict as to each defendant concerned in each count. The verdict in each instance must be unanimous. You may if you wish report your verdicts separately from time to time as you reach them unanimously, if that will aid you in

your deliberations, or you may wait until you have concluded all your deliberations. That is entirely up to you.

I just wish to make it plain that if in the course of your deliberations you have still not decided certain issues but you have reached a conclusion as to the guilt or innocence of a particular defendant on any particular count, it is entirely proper for you so to advise the marshal and the clerk and to come back and record that part of the verdict and then go back and resume your deliberations on such issues as you have not yet decided.

Your function is to weigh the evidence in the case and to determine the guilt or innocence of the defendants solely upon the evidence and these instructions. Under your oath as jurors, you cannot allow a consideration of the sentence which may be imposed upon a defendant if he or she is convicted to enter into your deliberations or to influence your verdict in any way. Your duty is to decide the case solely and only upon the evidence. In the event of conviction, the duty of imposing sentence rests solely upon the Court, and you are not to be concerned with it.

Each juror is entitled to his or her own opinion, but each should exchange views with his or her fellow jurors. That is the very purpose of jury deliberation:

To discuss and to consider the evidence, to listen

1
2 to the arguments of fellow jurors, to present your individual
3 views, to consult with one another, and to reach an agree-
4 ment based solely and wholly upon the evidence, if you can
5 do so without violence to your own individual judgment.

6 Each one must decide the case for himself or
7 herself after consideration with his or her fellow jurors.
8 But you should not hesitate to change an opinion which,
9 after discussion with your fellow jurors, appears erroneous.
10 However, if after carefully considering all the evidence and
11 the arguments of your fellow jurors you entertain a conscien-
12 tious view that differs from others, you are not to yield
13 your conviction simply because you are outnumbered or out-
14 weighed.

15 Your final vote must reflect your conscientious
16 conviction as to how the issues should be decided. I repeat
17 that you may ask to hear evidence read to you or you may have
18 exhibits sent in to you.

19 Also, if you wish, I will repeat any part of this
20 charge during your deliberations. Any such requests should
21 take the form of a note from the foreman of the jury to me.
22 Please make any such requests as specific as possible. Be
23 very careful that any such note gives no indication whatever
24 of the current state of your thinking on any count. Your
25 verdict will be announced only at the end of the trial and in

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open court, and that verdict will take the form of separate findings of guilty or not guilty as to each defendant on Count 1 and guilty or not guilty as to each defendant on Count 2.

The juror who sits in the number one chair will act as the foreman of the jury, unless for any reason he decides not to serve in that capacity, in which case your first order of business will be to elect another foreman of the jury and send me a note on that subject.

These are my instructions on the law to you, ladies and gentlemen. However, before you commence your deliberations, I am now going to give counsel an opportunity to meet with me in the robing room and to make any additional requests or objections to the charge. I will ask you to simply relax in your places for a moment while I meet with counsel for that purpose.

I will see counsel and the court reporter in the robing room.

(In the robing room.)

THE COURT: Does the government have any requests or objections to the charge?

MR. LEVINE: No, your Honor.

THE COURT: I will hear from defense.

Mr. Rosenberg?

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2 MR. ROSENBERG: Your Honor, I have no requests
3 to charge, but I do object to your Honor giving the alterna-
4 tive of heroin or cocaine in your charge. I know that we
5 have discussed it at great length, and certainly your Honor
6 has given much time to it. And let me just reiterate, for
7 all the reasons set forth in all that argument, I must
8 strenuously object to that part of the charge.

9 THE COURT: Very well.

10 MR. GRISORIO: I have the same objection, your
11 Honor, and in addition to that, I again request that charge
12 number 6, as presented to your Honor, be read to the jury.

13 THE COURT: I decline that request, Mr. Grisorio.

14 MR. WASHOR: Your Honor, I suppose all of the
15 conferences and exceptions and discussions taken in chambers
16 relative to requests to charge would constitute appropriate
17 exceptions for the appellate court, without enumerating each
18 and every one at this point.

19 THE COURT: Without presuming to speak for the
20 Court of Appeals, for my part I would have no question that
21 what you have just said is so.

22 MR. WASHOR: May I specifically just indicate
23 that as to the Court's charge relative to lack of differentia-
24 tion between the substance heroin and cocaine, I believe the
25 Court should instruct the jury that the government must estab-
lish beyond a reasonable doubt that the substantive question

1 must be from either Schedule I or Schedule II. If they
2 fail to do that, we do have a serious problem as to variance.
3 It could be a third substance. It could be a fourth substance.
4 And if they fail to prove what it is to their satisfaction,
5 we run the very serious chance of having someone accused
6 or found guilty of a crime for which they are not charged.
7

8 THE COURT: The defendants are certainly
9 entitled to a charge that the government must prove beyond a
10 reasonable doubt that the particular substance that we are
11 speaking of, or that has been referred to, is a controlled
12 narcotic substance. But it is of course also true that the
13 statute provides different penalties with respect to different
14 substances.

15 I had intended to touch upon the necessity of
16 establishing that particular element of the charge and did so
17 in part. What is now being raised is whether it should be
18 clarified or amplified or further focused in any way.

19 What is your reaction to that, Mr. Levine?

20 MR. LEVINE: Your Honor, I think the Court
21 charged the jury that they must find beyond a reasonable doubt
22 that a narcotic controlled substance was possessed with
23 intent to distribute or distributed. I think that the Court
24 charged essentially what Mr. Washor is asking. I don't know
25 how the Court could charge what he is asking. If he wants an

enumeration of all the narcotic controlled substances under I and II.

MR. WASHOR: No, no. Under III and IV.

MR. LEVINE: I don't know if there has been any reference -- I know Mr. Rosenberg made one reference to cocaine, which the government made one reference to in its rebuttal summation.

MR. ROSENBERG: Generally said, it could be many, many different --

MR. LEVINE: I don't think there is any evidence in the case, your Honor, about any narcotic controlled substances other than heroin or cocaine, and I think that the Court has covered both of those in its charge to the jury. If there is something more that Mr. Washor requests of the Court, I think the government ought to hear it before it responds.

MR. WASHOR: I am legally perturbed about the fact that a white powder could well be a substance in Schedule III or IV and not necessarily in Schedule I and Schedule II.

MR. ROSENBERG: I was under the impression that your Honor did limit it to heroin or cocaine.

MR. WASHOR: That is just the point.

MR. ROSENBERG: May I respectfully ask the Court

if that was the intention of the Court?

THE COURT: Well, that is really what we are talking about. I'm not sure that I charged them in precisely those words.

MR. ROSENBERG: You limited it in Count 2, your Honor, if I may interrupt, but I don't think you made it very clear in Count 1.

THE COURT: The possible difficulty that arises, i seems to me, lies in this: that the sections of the statute that provide for penalties provide that, with respect to a narcotic substance in Schedule I or Schedule II, the penalties are the same.

MR. WASHOR: But as to III and IV --

MR. LEVINE: Your Honor, there is no evidence in the record of any narcotic controlled substances in III or IV. Mr. Washor's request has no basis in the record.

MR. WASHOR: Judge, he keeps saying there is no evidence in the record. We don't have to produce evidence, in the record. They haven't proved that it is Schedule I and Schedule II other than by indirection. We have argued it could be cocaine, we have argued it could be something else. Let's not switch the burden just because we are making the request to charge.

It is a white powder. I suggest to you you can

1 take judicial notice, if there is such a thing anymore, that
2 the "pills," before they are manufactured and put into their
3 capsule form for illegal distribution, at one time are in the
4 form of white powder.
5

6 Now, there is no expert testimony as to how they
7 are mixed, how they are brought about. Suppose it is a mesca-
8 line that is being prepared there, it is in a white powder
9 form. They didn't bring the chemist. They didn't prove it.
10 You have got a chemist on this jury.

11 THE COURT: Would the government oppose a further
12 instruction to the effect that the government must establish
13 beyond a reasonable doubt that the substance in question was
14 either heroin or cocaine?

15 MR. LEVINE: Your Honor, the government feels that
16 the state of the charge as presently constituted is sufficient.
17 I think that it is even possible that the Court made reference
18 to that kind of a charge in its original charge to the jury.
19 I know the Court made reference to it in various ways, telling
20 the jury that they had to find that there was a narcotic
21 controlled substance beyond a reasonable doubt, and telling
22 them also that there has been evidence that there is both
23 cocaine and heroin.

24 So I think that what Mr. Washor is requesting has
25 really been completed. And whether these defendants prevail

in the Court of Appeals, if it gets to that, on the question of variance, which they have suggested to the Court here, I don't think is going to turn on the Court's further instructing the jury on what kind of a narcotic controlled substance they must find that the government has proved beyond a reasonable doubt.

Mr. Washor's request really leaves everyone up in the air your Honor.

THE COURT: I think, on reflection, that the charge with particular reference to the elements and the nature of the substance and the charge that the government must establish beyond a reasonable doubt that it was a controlled narcotic substance, and that heroin and cocaine are both narcotic controlled substances, is sufficient. I am going to let the charge stand on the basis previously given.

MR. WASHOR: Your Honor, one last exception, and that is failure of the Court to admonish, or give to the jury the question of voluntariness of defendant Smith's statement as a question of fact and the question of intelligent waiver by her at the time of the making of the statement. That is a question of fact.

MR. LEVINE: Your Honor, it is my understanding that the Court charged the jury on such matter. If Mr. Washor's understanding is that the Court did not, perhaps

the Court could reiterate the charge to the jury. It certainly is an important charge that ought to be given.

THE COURT: My own firm recollection is that I did give such a charge.

MR. WASHOR: Judge, I just missed it. If you did, of course, I have to withdraw the exception.

THE COURT: It came well towards the end, but I am quite sure that the record will show that on that point I gave the following charge:

"There has been testimony that the defendant Smith made a statement at the time of her arrest in which she admitted involvement in the diluting and packaging of heroin at 626 Riverside Drive. With respect to that statement by the defendant Smith, I have the following instructions:

"If you find that the defendant Smith did make the statement and made it voluntarily and knowingly, then you may give the statement such weight as against her and her alone as you believe it deserves after considering all the circumstances which were brought out in the evidence."

That is the charge I gave.

MR. WASHOR: I withdraw the exception, your Honor.

MR. LEVINE: Your Honor, I think the Court has

repeatedly admonished the jury during the course of the trial as to the particular weight to be given to the testimony of witnesses which precedes the conspiracy in the indictment.

I don't know that the Court's charge to the jury at this point in time considered reiterating that charge relating to prior similar acts, and perhaps at this time it might be possible to give the limiting instruction the Court gave on, I think, four or five earlier occasions relating to the testimony of Sims and McFarland and Yolanda Valdez Simpson.

THE COURT: It is true that that was not specifically reiterated in the charge I have just given. It was not specifically requested by the government or by anyone else in connection with this particular charge. I certainly don't mind giving it again. It was the law then and it is today. But do the defendants feel any concern as to whether a renewed reference on my part to the evidence of the prior acts, even though coupled with the appropriate limiting instruction, would tend to give the evidence of those prior acts a perhaps unwarranted prominence?

MR. WASHOR: I have a suggestion to make, if the Court will entertain the suggestion:

That your Honor admonish the jury, or rather,

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advise the jury, when we go back out there after this session, that all legal instructions, including and not limited to any limited instructions given to them during the trial as to how and in what manner they were to accept evidence and as to what use they were to make of such evidence, applies now as well as during the trial, and explain to them that, you would rather not go into those details over and over again, having done so so many times during the course of the trial, again advising that if there is anything they want to hear about your charge or any legal instructions they have the right to come out.

This will eliminate pinpointing and directing the aspect of prior similar acts. If they are aware of what you are talking about, then they will also be aware of the efficacy with which they can handle the matter in line with your instructions.

THE COURT: I wonder if that isn't better.

MR. GRISORIO: I would prefer that, your Honor, rather than bring back the whole subject again.

THE COURT: It seems to me it is better. I am a little reluctant from the defendants' point of view to have the last thing that falls from my lips a specific reference to prior acts. I would prefer not to do that.

MR. ROSENBERG: Your Honor, I was going to suggest

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that I will make no request and I think it should be left alone. Co-counsel seriously considered that it be left alone. I think we covered it in summation. I think Mr. Levine covered it in summation. I think your Honor's limiting instructions during the whole trial was effective.

It is an intelligent jury, they have listened to it.

MR. WASHOR: My suggestion was only set forth if you were going to abide by the request of the government. If you are not, I will concur with co-counsel that it be left in its proper perspective.

THE COURT: I think I will leave it as is.

MR. LEVINE: Your Honor, can we be clear, at least at this point in time, then, that defendant Brown and the defendant Knuckles and the defendant Smith waive any objection they have to the Court's not charging the jury on those prior acts before the period in the indictment?

MR. WASHOR: No, I waive absolutely nothing. Like every counsel, we have taken our positions. They are clear on the record. The Court says he is not going to give that instruction.

MR. LEVINE: I think it is clear the Court will give the instruction if defendants' counsel for the particular defendants request it.

1
2 THE COURT: Yes, that is true. Let's not have
3 any misunderstanding.

4 MR. WASHOR: There were no prior acts on behalf of
5 the defendant Smith. What am I supposed to request the Court
6 to charge, your Honor?

7 MR. ROSENBERG: I do not request that it be
8 charged.

9 MR. GRISORIO: And I do not request it.

10 MR. LEVINE: Your Honor, the defendant Smith
11 could still request it if he wished, because the limiting
12 instructions have been given by the Court on several occa-
13 sions after defendant Smith's request. We are dealing with
14 a specific instance here of a request to charge, and if the
15 defendants don't want it, then it ought to be clear on the
16 record for this Court and for any possible appellate court.

17 MR. GRISORIO: Mr. Rosenberg and I have made it
18 quite clear that we do not want it.

19 MR. LEVINE: The answer is either yes or no on
20 the record and let's get it clear on the record.

21 THE COURT: Certainly there is no obscurity on
22 the record insofar as Mr. Rosenberg is concerned and Mr.
23 Grisorio is concerned. Mr. Washor suggested a possible
24 alternative to me.

25 MR. GRISORIO: That alternative is if your Honor

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was going to charge at all.

MR. LEVINE: Can we hear from the defendant Smith, your Honor, specifically?

MR. WASHOR: Not at all. I don't think the government has the right to inquire what we want to do regarding requests to charge.

MR. LEVINE: Then the government urges the Court charge the jury as the government has requested. If the defendant Smith doesn't make known to the Court what would constitute a waiver on this particular request to charge, then the government urges that the charge be given.

THE COURT: Let's put it this way, Mr. Washor --

MR. WASHOR: Is this going to be reversible error one way or the other? I doubt it most seriously.

THE COURT: I will give a prior act or related charge which I regard appropriate if you request me to do so.

MR. WASHOR: I do not make any request of you, your Honor.

THE COURT: All right.

(In open court.)

THE COURT: I have no additions or amendments to the charge.

Consequently, the jury is about to commence its

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1 deliberations. It now becomes my duty to discharge our two
2 alternate jurors, Mr. O'Connell and Ms. Duff. I do so with
3 deep appreciation to you both. You have been just as faith-
4 ful in your attendance at this trial as the first twelve
5 jurors were. You have been just as prompt and attentive
6 to the evidence, and you have fully participated in this
7 trial and assisted this Court.
8

9 It has happened, happily, that the occasion has
10 not arisen making it necessary for you to replace one of the
11 twelve first chosen jurors, but you were present and ready
12 and willing and able to do so had the occasion arisen, and it
13 follows from that that, just as the twelve other jurors have,
14 you have rendered real public service to this Court and to
15 the proper administration of justice. And I hope you leave
16 this court with an awareness of my own gratitude and
17 appreciate for it.

18 You are now discharged from service in this case
19 with my thanks.

20 Mr. Farley may have some additional appropriate
21 instructions.

22 (The two alternate jurors were excused.)

23 THE COURT: I will ask the Clerk of the court to
24 distribute to the jury copies of the indictment.

25 Ladies and gentlemen, I will now ask you to

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commence your deliberations. As I said to you earlier, arrangements are going to be made for you for dinner tonight. I trust you will find it sustaining, although it may not be haute cuisine. And also, arrangements have been made to bring you home later this evening.

I will ask you now to retire to your jury room and commence your deliberations.

(At 5:30 p.m. the jury retired to the jury room to commence deliberations.)

WASHOR

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that
deponent is not a party to the action, is over 18 years of age
and resides at 286 Richmond Avenue, Staten Island, N.Y.
10302. That on the 10 day of Jan. ,19 78^{at}
No. 1 St. Andrews Pl., NYC

deponent served the within *Appel*
upon U.S. Attorney, Sot. Dist. of NY

the Appellee herein, by delivering /true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Appellee therein.

Sworn to before me this
10 day of Jan. 1978

Ed Bailey
Edward Bailey

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

